Final Report

Implementing Federal Consistency Requirements in Washington State (1976 - 1978)

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I. GENERAL INTRODUCTION

This study was conducted under a contract with the Office of Coastal Zone Management (OCZM), NOAA, U.S. Dept. of Commerce. The task was to monitor the implementation of the federal consistency provisions of the federal Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. §§1451, et. seq. The Washington Coastal Zone Management Program (WCZMP) was approved on June 1, 1976 by the Secretary of Commerce pursuant to authority under the CZMA. With program approval, the consistency provisions of the CZMA took effect in Washington State. Washington's program was the first state program to be approved in the country, and it is believed that the two years of experience in Washington state may prove useful to others in the country concerned with the implementation of the federal consistency provisions.

The federal consistency provisions require federal agencies to conduct their activities in the state's defined coastal zone in a manner consistent, to the maximum extent practicable, with the approved program. And federal agencies issuing federal licenses or permits, or providing technical and financial assistance for activities in the State's coastal zone, may do so only if the proposed project or activity is consistent with the State's approved program.

The approach of this work was to study six projects or federal activities in which the WCZMP and the federal consistency provisions have been issues. Information was gathered from interviews and from correspondence among parties involved in each case--state and local coastal zone authorities, federal agencies, applicants for federal licenses and permits, litigants, etc. The help of many individuals is gratefully acknowledged and appreciated.

The intent of this study was to focus specifically upon Washington's implementation of the federal consistency provisions. No attempt was made to examine all the intergovernmental relations aspects of the

review of coastal development in Washington state. Coordination of local, state and federal requirements often occurred under existing laws requiring agency coordination, without any reference to federal consistency. In the case studies, federal consistency requirements were cited as one of the reasons the interagency coordination was occurring.

The report is organized in two major sections: Conclusions and Recommendations and Case Analyses. The conclusions and recommendations discuss the role state, local and federal agencies have played in applying the consistency provisions, the increased coordination resulting from the implementation of federal consistency, and legal opinions in which federal consistency has been addressed. The conclusions and recommendations arise directly from the case analyses. The Case Analyses section of the report discusses in some detail how parties used and interpreted federal consistency in the resolution of use controversies or other specific federal actions. Reference is made to correspondence, interviews and legal materials. Each case analysis includes an appendix setting forth the chronology of events. A synopsis of the case analysis is presented here since the conclusions and recommendations contain references to the cases.

Synopsis of the case analyses

1. National Oceanic and Atmospheric Administration's (NOAA) proposed pier construction at Sand Point.

NOAA's plan was to begin construction on its Western Regional Center in the spring of 1978 at a site on Lake Washington in Seattle known as Sand Point. The project would consolidate many of NOAA's West Coast activities at a single location. Plans included the moorage of large vessels at the site--a feature that became controversial in the community and was subsequently challenged. The application of consistency to the project was questionable since the lake is arguably not in the state's defined coastal zone. However, NOAA initiated contacts with

the state agency responsible for implementation of the consistency provisions to discuss the consistency of the proposed construction activities. Those discussions resulted in NOAA's preparation of a statement in which it certified that the project was consistent with the WCZMP.

The project EIS was challenged in a lawsuit in which plaintiffs argued that the decision to locate ocean-going ships at Sand Point was inconsistent with the WCZMP. This claim was based upon the fact that moorage of ocean-going ships on the lake was contrary to the policy recommendations of an advisory board which had been convened to insure coordination among the various local shoreline planning jurisdictions surrounding the lake. The board's policy against moorage of ocean-going vessels was not adopted by Seattle, the local permitting authority for the Sand Point area.

A federal court ruling on a motion to enjoin construction of the project concluded that plaintiffs were not likely to prevail on the merits of their consistency arguments. It was concluded that the local master program "preempted" the policies of the advisory board, and therefore the proper focus for determining consistency of the Sand Point project was the Seattle local master program which did not contain a policy excluding ocean vessel moorage. Despite the court's conclusion on this point, the injunction was issued because it was decided that the plaintiffs were likely to prevail on other arguments attacking the EIS. At this writing, construction at Sand Point has been indefinitely postponed while NOAA endeavors to correct the defects in its EIS. The likelihood that the project will be resumed is unclear since the court held that NOAA should more carefully consider alternatives to its Sand Point siting decision.

2. Navy activities in the Washington coastal zone

The Navy was a very active participant with the state during the development of the WCZMP. This keen interest undoubtedly related to the Navy's construction of its Trident submarine base along scenic Hood Canal in Puget Sound which was proceeding at the same time. The operation of the consistency provisions represented a new potential for state involvement in Navy construction decisions.

The Navy urged the state to make an affirmative commitment to promoting Navy uses of the coastal zone within the WCZMP. In negotiating with the Navy during program development, the State Department of Ecology (DOE) avoided making a positive commitment to the Navy. However, contacts between the two resulted in administrative arrangements that seemed to encourage a more coordinated planning process. For example, the Navy participated in the review of local shoreline master programs, and a procedure was established for consistency review for new phases of Trident construction. Furthermore, the Navy has now made some efforts to develop information about Washington coastal zone resources and zoning which will minimize conflicts with the state over future Navy uses.

3. Atlantic Richfield's (ARCO) proposed oil port construction at Cherry Point.

Atlantic Richfield, which operates an oil port facility at Cherry Point, Washington, planned to expand that facility as one aspect of a larger scheme to ship Alaskan oil to Midwest refineries. Tankers were to bring crude to the Cherry Point transshipment facility from which it would be routed north in existing pipelines across Canada. The proposal was resisted by some in the state because it would require increased tanker traffic through Puget Sound. Former Governor Dan Evans included a policy

statement in the WCZMP which opposed further construction or expansion of oil facilities at locations which would result in increased tanker traffic on Puget Sound.

Despite the Evans policy, ARCO applied for a Corps of Engineers §10 permit to expand at Cherry Point. It was anticipated that WCZMP constraints would be removed. Governor Dixy Lee Ray, who was elected in November, 1976, supported the Cherry Point transshipment idea and undertook amendment of the WCZMP to delete the Evans policy statement.

The State Department of Ecology (DOE) failed to raise consistency objections to ARCO's pending §10 application. Rather it had determined to await the outcome of the State Energy Facility Site Evaluation Council's (EFSEC) deliberation. EFSEC is a separate body set up under state law to deal exclusively with energy facility siting decisions. An environmental group brought suit in state court to compel the agency to inform the Corps of the inconsistency of the proposal. The court held that DOE must respond to the Corps notice on the project and could not postpone action in anticipation of program amendment. The controversy was cut short when Congress passed a bill which essentially adopted the Evans policy statement banning oil port expansion or construction in Puget Sound.

4. The Ray v. Atlantic Richfield case, 98 S. Ct. 988 (March, 1978)

In this litigation, ARCO challenged a state law regulating oil tanker construction and oil tanker traffic in Puget Sound. ARCO argued that federal legislation had preempted the state law.

The State, in support of its argument that federal legislative intent had not been to exclude state regulation, pointed to the policy of the CZMA. Washington claimed that Congressional intent was to involve states more fully in the planning and control of coastal zone resources. It also argued that since reference to the Tanker Law was made in the

WCZMP document, that law was a part of the federally-approved program. Based upon these arguments, Washington claimed that federal policy supported the state legislation and did not preempt it.

After the lower court ruled that the state was preempted by the federal legislation, Washington appealed to the Supreme Court. The Court rejected the state arguments that federal policy supported state regulation of oil tankers. The Court agreed that the CZMA expressly contemplated joint federal-state regulation of the coastal zone. In contrast, however, the federal law which delegated authority to the Department of Transportation for the regulation of oil tankers did not indicate that the states were to participate in that activity.

5. City of Ocean Shores airport construction project.

Ocean Shores, a community of 1,000 people on the Washington coast, applied for grant funds from the Federal Aviation Administration for airport planning and construction. FAA's attempt to meet its responsibilities under the consistency provisions led the agency to communicate with DOE regarding the coastal zone impacts of the plan. DOE objected to the town's preferred site because some sensitive wetland areas would be adversely affected.

An examination of this case reveals the interaction among the state agency, a local government applicant for federal funds and the federal granting authority in working through their individual consistency responsibilities.

6. NPDES delegation to EFSEC

The Energy Facility Site Evaluation Council (EFSEC) is an entity organized under state law to comprehensively evaluate applications for major energy facility siting. The Council consists of representatives from various state agencies which have authority over subject matter areas

affected by siting decisions. When a Council siting decision has been made, it has a preemptive effect upon any local zoning regulations that may prohibit such siting in the chosen area.

EFSEC contacted the Environmental Protection Agency requesting that it be delegated authority to issue NPDES permits for energy facilities authorized by it. The EPA requested guidance from the Office of Coastal Zone Management since it was concerned about the consistency implications of such a delegation. OCZM informed EPA that an administrative decision of this nature must first consider whether the decision would be consistent with the state coastal program.

II. CONCLUSIONS AND RECOMMENDATIONS

STATE'S ROLE IN IMPLEMENTING CONSISTENCY

The State Department of Ecology (DOE) argued for interpretations of the federal consistency provisions that would increase state influence over federal projects and activities in the coastal zone. In the cases studied, DOE responded to federal agencies in a cooperative effort to meet consistency requirements. On one occasion DOE gained concessions from a federal agency after asserting that the proposed project was inconsistent. At present, the state does not view the consistency provisions as an important means of influencing or controlling coastal development.

After two years experience with an approved coastal zone management program, the State Department of Ecology (DOE) does not regard the consistency provisions as offering a very important or useful new tool for affecting federal decision making in the state's coastal zone. The additional control over projects of private developers in the coastal zone offered by §307(c)(3) is seen as unnecessary. Sec. 307(c)(3) provides that federal licenses and permits cannot be issued for inconsistent projects. And, in the state's opinion, the potential for affecting federal projects in the coastal zone was largely thwarted by various interpretations of key provisions of the CZMA.

Over the seven years that followed the state's passage of the Shoreline Management Act, the state agency had made use of various federal coordinating devices to insure communication with federal agencies involved in decision making affecting the coastal zone. These mechanisms include the NEPA and A-95 processes. Shoreline policies have been implemented through the system of project notification, review and comment which these processes entail.

The state has argued vigorously for interpretations of the CZMA that would increase state involvement in federal project planning. It was hoped that the federal excluded lands provision (16 U.S.C. §1453(1)) would define those lands narrowly thereby requiring more federal projects to be

subject to the consistency provisions of the CZMA. The state has challenged the Department of Justice interpretation of excluded federal lands as those owned or leased by the federal government. See below at p. 47 . The Department of Ecology has also expressed its dissatisfaction with the exclusion of federal agencies from the meaning of the term "applicant" in §§307(c)(3). Once again, in the state's view, the effect of that definition results in federal agencies being subject to fewer constraints in bringing their projects into harmony with the state program. These developments have led to the state's negative perception of the usefulness of consistency in achieving notable results.

It is these controversies which have absorbed much of the state's attention in the two-year period since program approval. And the application of consistency to the various projects and events covered in the following case studies has proceeded in the midst of some confusion. All of the projects followed herein had their beginnings prior to the adoption of the final federal consistency regulations in March, 1978, and in most cases prior to the final approval of the WCZMP. Nevertheless, the federal agencies involved made many inquiries to DOE regarding the effect of the consistency provisions upon their plans. For example, NOAA questioned the need for consistency review of its Sand Point proposal. FAA contacted DOE to question whether the Ocean Shores airport proposal received attention and a review for consistency purposes. This active inquiry suggests that federal agencies expected an active and positive approach from the state on consistency matters.

In order to assist federal agencies in meeting consistency requirements the state agency prepared and circulated operational guidelines which described the Department's chosen procedures for consistency review.

The guidelines, a thirty page document which addressed itself to federal agencies, described the procedures to be used by state and federal agencies to establish the consistency of federal actions. It defined in general terms the meaning of each §307 category of federal action--"activities", "development projects", "permits", etc. It included information from the Washington Coastal Zone Management Program document identifying the boundaries of the "coastal zone". It indicated the notification procedures that would alert DOE to the need for review, indicated who would make consistency determinations for each type of consistency review required by the federal law and specified the duties of the federal agency in each circumstance.

Since the adoption of the final federal consistency regulations, DOE has been refining its federal consistency procedures. DOE is now compiling a list of the federal grants, permits, license, activities and development projects subject to consistency review. Further, DOE is clarifying the criteria for determining consistency by identifying precisely the state laws which comprise the state coastal zone program.

The case studies revealed problems with the guidelines, many resulting from the lack of a legal review before their publication to insure conformity with the CZMA. For example, DOE attempted to relieve applicants from the necessity of filing certificates of consistency along with their applications for federal permits and licenses, contrary to CZMA provisions. DOE has maintained that it is more appropriate for it to make consistency determinations than applicants. It should be noted that the lack of federal regulations in this initial period probably contributed substantially to the confusion about the application of consistency in the case studies.

In one instance the state's choice of procedures resulted in legal action against the state. The discrepancy between the CZMA and DOE procedures was challenged by litigants in the Coalition Against Oil Pollution v. Washington case, discussed at p. 66 . In that suit the court indicated that DOE's decision to forestall making a consistency determination until the outcome of another agency's consideration was not permissible under the CZMA.

Other procedural problems with the guidelines became evident in the Ocean Shores airport case. For example, FAA had maintained that the state agency must indicate its consistency objections to the airport grant application within the A-95 60-day time limit or lose its opportunity to object. DOE's operational guidelines required the federal agency to insure that the state had determined the consistency of the proposal or the inapplicability of consistency review, without mentioning a specific time-limit. Those problems were worked through by consultations between FAA and DOE. It is likely that the implementation of the new federal consistency regulations, and more experience with consistency, will eliminate many of these procedural problems.

Even with guidelines, the state was reserved and conservative in asserting consistency. A question remains whether the state's pessimism about the value of the consistency provisions is warranted or not. Perhaps those provisions offer the state new leverage in its dealings with federal agencies if it chooses to apply them vigorously. It was clear in the cases studied that federal agencies were anxious to meet consistency requirements or at least to promote that appearance, and to appease the state when troubles arose. For example, when a letter from DOE challenged the consistency of Trident construction even before final approval of the WCZMP, the Navy initiated further discussions to affect environmental

mitigation. NOAA's declaration in its Corps permit application that its Sand Point project was consistent presented DOE with an opportunity to insist that its policies for shorelines of statewide significance be more carefully considered. Although the two agencies had agreed the provisions did not apply to construction at the Sand Point site, NOAA's actions seemed to assume they did which, in turn, would appear to prompt DOE's consideration of substantive policy.

In both examples cited here, DOE perhaps could not have prevailed in applying its shoreline policies to the federal projects because the application of the consistency provisions could not be supported, legally. However, federal agencies appear to expect more consultation and compronise with the state now that a coastal program and the consistency provisions are in effect.

Despite the fact that various interpretations of the CZMA may have watered down the effect of the consistency provisions upon federal projects and activities, the expectations of federal agencies and the new regulations may well offer the state important opportunities to exert more influence upon federal projects and activities than it has recognized. It is true that the consistency provisions appear to contemplate an "after the fact" review of proposed activities and projects for their conformance with the state program. However, an awareness of the consistency provisions may also prompt some federal agencies to engage in advance planning with the state before projects are fully developed to avoid state objections based on coastal zone impacts. Indeed, at least two "advance planning" projects involving federal and state officials are underway in Washington--the Grays Harbor and Columbia River estuary planning task forces.

The new federal consistency regulations (43 Fed. Reg. No. 49, 10510-10533, Monday March 13, 1978 (to be codified at 15 C.F.R. Pt. 930)) can support a vigorous state approach to the implementation of consistency and may further encourage an advance planning relationship between state and federal authorities. Although federal agencies are responsible for consistency determination regarding their own activities, the term "federal activity" has been given a broad definition. And states are encouraged to monitor federal activities which require consistency review and to engage in ongoing consultation with federal agencies. Furthermore, ongoing federal activities begun prior to program approval may still be subject to consistency review.

Both the state and federal agencies may find that such advance planning and consultation is desirable because it minimizes conflict. It is suggested that the initiative of the state agency in encouraging planning and its willingness to seize opportunities to strengthen federal regard for its program may be the key factors determining the future significance of the consistency provisions. DOE's attitude toward consistency has been passive, because they do not believe it adds any new powers to control federal actions. Federal agencies, however, appear to expect that consistency requires that they conform closely to state coastal policies. Federal agencies expect the state to establish clear substantive policies and to assert them in particular cases. If this is not forthcoming, federal agencies will learn quickly that consistency is not viewed seriously by the state. In this way, the consistency concept is undermined, and its potential future effectiveness is minimized. This suggests that states should look for opportunities to use the consistency provisions, so that their coastal program is taken more seriously by federal agencies.

LOCAL GOVERNMENTS' ROLE IN THE CONSISTENCY DEBATE

Local authorities did not participate in consistency discussions. Consistency determinations were made by DOE. Local governments became involved in site selection and on-site planning consultations with federal project developers, or reviewers, applying relevant provisions of local shoreline master programs. Such consultation was not done because of the consistency provisions.

The cases studied revealed that local permitting authorities deferred to DOE's resolution of consistency issues with project developers. Seattle officials did not participate in discussions between NOAA and DOE in which the question of the application of federal consistency to the Sand Point proposal was discussed. And although the Ocean Shores local master program "zoned" the City's preferred site for airport development, the City accepted DOE's comments as authoritative on the consistency issue. Topics covered by federal agencies and DOE in debating the consistency issue involved fundamental concerns: questions of the application of consistency project siting issues, major environmental mitigation and public access considerations.

Local governments did, however, become involved in the discussion with project developers of site selection, construction techniques and design details. It does not appear that consistency prompted this interaction. It would have happened in any case since federal agencies must consider local land use controls in their decision-making. For example, NOAA conferred frequently with the Seattle Office of Community Development on such topics as proper placement of buildings to insure compliance with shoreline management regulations.

At least in the early program stages examined here, it would seem that DOE was a more appropriate entity for the resolution of fundamental consistency questions than were the local permitting authorities. Basic procedural questions, such as those that emerged in the Ocean Shores

example, and interpretations of program coastal zone boundaries, such as occurred in the NOAA-Sand Point case must necessarily be decided at the state level.

FEDERAL AGENCY ROLE IN THE CONSISTENCY DEBATE

Federal agencies made active efforts to meet their legal responsibilities under CZMA. These efforts often involved increased contact with the state agency.

Federal agencies involved in the Washington cases studied commonly showed concern that their actions and projects met the legal requirements of the consistency provisions. In most of the examples, initiation of consistency discussions came from the federal agency. How agencies went about determining their responsibilities varied, depending upon the significance of the project or activity, the federal agency's stake in expediting a decision and whether or not the federal action was controversial. In some cases, the Federal agency performed a careful, independent legal analysis of the CZMA; in others, efforts were made to communicate with the state agency or OCZM to ascertain requirements.

Legal analysis to determine requirements: The Corps of Engineers carefully researched §307 (C)(3) when processing ARCO's application for oil port expansion. The attention shown to the CZMA undoubtedly resulted from the fact that the Corps was threatened with litigation on the issue. The Navy carefully developed its understanding of key CZMA provision, especially the excluded lands provision, and argued for an interpretation that would minimize WCZMP effects upon Navy coastal zone uses. The decision to locate the huge Trident submarine base had occurred during WCZMP development.

Contacts with DOE and OCZM to fulfill requirements: NOAA initiated discussions with DOE concerning the application of consistency to the Sand Point project. DOE had not urged consistency review because of its determination that the project was within the "second tier", and thus not in the coastal zone and subject to consistency. Notwithstanding this view, the federal agency adopted a more conservative approach and discussed the consistency of its project with the state's coastal zone and shoreline management programs. Its concern was not with the precise legal requirements of the CZMA but with insuring that the project was consistent with state programs. Consistency was negotiated with the state, not argued on legal research grounds.

FAA discussed procedural issues with OCZM and DOE during the Ocean Shores application process. FAA perceived its consistency responsibility as insuring that the state recognized and resolved consistency questions before FAA would grant funds.

In the NPDES delegation example, OCZM confirmed that EPA was required to consider the consistency of its delegation decision. OCZM performed an advisory function for a federal agency attempting to meet consistency responsibilities.

Consistency requirements, then, were met through consultation and independent legal analysis. Consistency provisions seemed to stimulate negotiation between the State and Federal agencies, especially in projects where some planning remained to be done. Crystallization of legal issues raised by the consistency provisions was more likely to occur if the Federal agency anticipated challenge to its decision or it perceived possible limitation upon its discretion in its own uses of the coastal zone.

These federal agencies have shown themselves to be, if not willing partners in the debate, at least anxious to conduct their affairs to avoid legal challenge. The attention given to the state program and state processes could be used to the advantage of a state willing to actively advance its coastal zone program.

OCZM ROLE IN CZMA LITIGATION AND CONSISTENCY DISCUSSIONS

OCZM became involved in litigation in which CZMA issues were raised by the parties. The federal office also acted as consultant to state and federal agencies faced with consistency responsibilities.

On two occasions, Robert Knecht, Acting Assistant Administrator for Coastal Zone Management at OCZM, responded to litigants' requests for affidavits interpreting or elaborating on some of his actions under the CZMA. Such an affidavit was discussed in appellee ARCO's brief for the Supreme Court in the Ray v. ARCO case. ARCO brought suit in federal court challenging the Washington ban on large supertankers in Puget Sound. Washington argued before the lower court that the Tanker Law was an integral part of its management program. ARCO procured Knecht's affidavit in which he declared that it was not his intent, when approving the WCZMP, that the Tanker Law be part of it.

The other affidavit was prepared for litigation in which a private group challenged the NOAA-Sand Point project. The group argued that NOAA should have discussed the policies for shoreline development produced by a state advisory board. Knecht's affidavit indicated that it was the local shoreline master program, not the advisory board's policies, which he recognized as part of the WCZMP.

It is not certain that these affidavits made much difference in the two law suits. It does indicate that OCZM can influence consistency litigation by its interpretation of the CZMP it approves. This role could put the federal OCZM in a position of influencing local land and water use decision-making, a function the federal legislation clearly wanted handled by state and local governments.

OCZM has also consulted with agencies addressing questions to it regarding consistency responsibilities and procedures. For example, the federal office confirmed that EPA must consider the coastal program implications of its administrative decision to change NPDES delegation from DOE to EFSEC (for energy facilities alone) in Washington State. It also advised FAA to contact the state agency to discuss consistency procedures before awarding funds for airport planning and construction.

This latter described function of OCZM--to assist agencies with their questions about consistency and to encourage cooperation between federal and state entities--is more in harmony with the policy of the CZMA. The Federal legislation seeks to encourage an active, comprehensive approach to coastal zone planning with substantive policy decisions and control at the state level. OCZM's role should be to provide assistance to states in developing procedures to encourage communication

with federal agencies active in the States' coastal zones. By permitting itself to become drawn into litigation, OCZM undermines the CZMA scheme for the resolution of substantive issues by the states.

COORDINATION AND NEGOTIATION RESULTING FROM THE CONSISTENCY REQUIREMENTS

The §307 provisions have usually resulted in increased negotiation among Federal agencies, DOE and applicants involved in coastal zone development. In turn, these contacts have encouraged better articulation of coastal zone program objectives and procedures. In one rather unusual case, CZMA arguments became another weapon in litigant's arsenal and did not result in greater consultation.

Reference to the cases studied will illustrate these points. The NOAA facility proposal and Navy-Trident construction were occasions for meetings between state and federal authorities. Specific discussions of consistency in those contexts resulted in the development of procedures to insure that the WCZMP had been adequately considered. Navy agreed to submit consistency certifications along with Corps §10 permits for phases of Trident construction. Similarly, NOAA conducted a consistency evaluation which was included in its Corps §10 permit for dredging at Sand Point.

Often such sessions between DOE and a federal agency have led to clarification of the Washington Program, although the central goal of discussion had been to enable the Federal agency to determine its consistency responsibilities. EPA's concerns about consistency during its consideration of NPDES delegation to EFSEC culminated in the State's review of EFSEC functioning to insure coordination with the WCZMP. Ocean Shores' application for grant funds alerted the State and FAA to the procedural details that must be worked through if §307(d) is to be fully implemented.

There are also indications that another general effect of the consistency provisions may be to encourage more strenuous attempts by Federal agencies to mitigate harmful environmental effects of their projects and to promote the goal of comprehensive coastal zone planning in other ways. For example, DOE's consistency-based objections to Trident construction apparently resulted in Navy's agreement to add some recreational mitigating features to construction plans. NOAA worked closely with Seattle Office of Community Development in reviewing project plans for conformance with local master program regulations. And, the insistence of some local permitting authorities that Navy property be classified in their local master programs may result in the classification and use of Navy lands compatible with the classification and use of adjacent non-federal lands.

It should be emphasized that the results of this study do not conclusively show that these benefits (e.g., Navy compliance with local zoning, fuller mitigation in federal projects) would not have happened in the absence of the consistency provisions. There is no evidence that Navy has altered any existing development plans, or that NOAA would have ignored local master program regulations in the absence of an approved WCZMP. However, the cases do indicate that federal agencies are concerned about their responsibilities under the consistency provisions, and it is a fair assumption that they are likely to make a substantive difference upon Federal actions in Washington. How important this "difference" is will probably depend upon how energetic and innovative state and federal agencies will be in implementing consistency.

In the ARCO-Cherry Point case study consistency offered little opportunity for negotiated decision-making. The circumstances of the ARCO

application were unique among the cases because the issue was so clearly addressed in the WCZMP. The Cherry Point construction proposal had been anticipated during Program development, and the Evans policy statement was included to prevent oil transport expansion at the Cherry Point refinery.

The Evans policy statement represents an unusual addition to the WCZMP since it does not address broad policies or procedures to be used for coastal zone management, but prohibits one type of use for a portion of the Washington coastal zone. Thus, the ARCO application was a rare example of a case in which the program document essentially standing alone would settle the consistency question. Seldom will consistency issues arise in the context of a construction proposal like this when the program provides such a clear answer. ARCO made no attempt to argue that the proposal was consistent with the Evans statement.

In view of the above-described situation, one can see that parties would not readily be inclined to compromise. Opinions about the advisability of tanker traffic on Puget Sound were highly polarized. Since the resolution of the consistency issue was clearly in their favor, those opposing Cherry Point expansion would achieve nothing through compromise.

This suggests that the more general a state CZMP, the more useful the consistency provisions are in resolving controversy, because there is room for negotiation. At this date, most CZMP's are general and contain policies and criteria which allow flexibility. If programs become more specific, the fear of consistency as a legal club rather than an invitation to negotiate may evolve. This will be useful for planning because program changes will be reviewed closely by federal agencies prior to their adoption.

SYNOPSIS OF JUDICIAL OPINIONS DECIDING CZMA ISSUES

Three court cases resulting in judicial opinions bearing on CZMA have occurred in Washington since WCZMP approval. A brief discussion of those cases, the issues presented and their resolution is presented here.

Ray v. ARCO, 98 S. Ct. 988 (March, 1978).

This case involved a state law regulating vessel construction and traffic control for oil tankers in Puget Sound. The state law also banned tankers over 125,000 dead weight tons from entering the Sound. The legislation was challenged by ARCO in a 3-judge district court which ruled the legislation had been preempted by the federal Ports and Waterways Safety Act (PWSA). The PWSA directed the Secretary of Transportation to establish rules and regulations for the design and construction of oil tankers. The Coast Guard was given broad powers to establish vessel traffic control systems including authority to set vessel size and speed limits, restrict vessel operations in hazardous areas and take other measures to assure safety and the protection of the marine environment from pollution.

In addition to arguments denying a Congressional intent to preempt state activity in oil tanker regulation, Washington argued before the lower court that the CZMA established an affirmative federal policy supporting state efforts to regulate coastal resources. The State contended that the state Tanker Law was a part of the WCZMP, which had been given federal approval by the Secretary of Commerce. The argument was rejected by the lower court.

Washington appealed the lower court ruling without articulating the same CZMA arguments it had raised below. Whether or not the Tanker Law

was included in the program, and had therefore received federal approval, had become a serious issue in the meantime. Instead, the State argued against the preemption holding of the lower court relying upon the CZMA as evidence of a federal policy of cooperation with the states in matters affecting coastal resource decisions.

The Supreme Court disposed of this contention in a footnote in which it observed that whereas the CZMA contemplated joint federal-state coordination, the PWSA (granting oil tanker regulatory responsibility to the Dept. of Transportation and the Coast Guard) did not anticipate joint efforts, since there was no explicit role assigned to the states in the PWSA to meet its objectives. The Court ruled, however, that some of the state regulations could stand until the Coast Guard adopted regulations that were inconsistent or considered similar regulatory measures and decided they were inappropriate.

Thus, the Supreme Court indicated unwillingness to view the CZMA as having extended state powers into specific regulatory areas in which states are found to have been preempted.

It would seem clearly possible that regulation of land and water uses like those the Tanker Law attempted to control can be shown to be reasonably within the subject area of coastal zone management. The Court, however, was persuaded that federal legislation dealing with the specific issues the Tanker Law sought to address could limit the broader subject area which comprehensive coastal zone planning seeks to control. It would seem then that federal legislation dealing with specific subject areas may preempt subject areas that could logically be included in a coastal zone program.

Save Lake Washington v. Frank, #C77-914M (D.C.W.D. Wash.) February 16, 1978 (unpublished opinion).

This case involved private challenge to an environmental impact statement prepared by the National Oceanic and Atmospheric Administration (NOAA) for construction of its Western Regional Center at a site on Lake Washington in Seattle. Plans called for the moorage of ocean-going and commercial vessels on the site. Some local residents with an interest in maintaining the residential quality of development around the lake opposed that part of the project involving dredging, pier construction and vessel moorage. When local shoreline master programs were first being developed, local jurisdictions surrounding the lake had met to establish policies for lake shoreline development. Those policies included a ban on the expansion of ocean-going and commercial moorage on the lake. Those policies were intended to be included in the local master programs of the participating jurisdictions. However, DOE approved the Seattle local master program despite the fact that the city had not included the vessel policy in its program.

Save Lake Washington challenged the EIS on the NOAA project on several grounds, including an argument that the policy against vessel moorage on the lake should have been discussed. It also contended that the proposal was inconsistent with the WCZMP for failure to comply with the policies.

The issues were considered in a motion for preliminary injunction to halt construction. The court granted the injunction based on a decision that the plaintiffs were likely to prevail on some of their NEPA arguments. However, the plaintiffs arguments based upon the CZMA were rejected by the court. It was held that NOAA need not have discussed the advisory body's policies because they were superseded by DOE's approval of the

Seattle local master program.

Coalition Against Oil Pollution v. Washington, #830785, Super. Ct. King County, Wash., July 22, 1977. (unpublished memorandum opinion.)

This suit was brought by an environmental group opposed to the expansion of oil port facilities in Puget Sound. This issue was considered during development of the WCZMP and the program contained a policy statement included by former Governor Dan Evans against the expansion of existing facilities or the construction of new facilities on Puget Sound. The policy was opposed by Governor Ray who was elected after program approval. She favored program amendment to delete the policy, and efforts have been made to amend the program for this purpose.

ARCO, which owned an existing facility in the Sound, applied for a Corps permit to expand the terminal. Under the applicable consistency provision of the CZMA, §§307(c)(3), ARCO was required to certify the consistency of its proposed construction, and a Corps permit could not issue in the event of the inconsistency of the proposal. ARCO's consistency certification on the project maintained that the proposal was consistent with all "legally valid" portions of the state program. ARCO then instituted suit in federal court challenging the Evans policy as not a valid part of the WCZMP. The state agency failed to respond to Corps notice of the pending application, indicating that it would await the determination of the Energy Facility Site Evaluation Council on the application. A private environmental group then began suit in the Coalition Against Oil Pollution v. Washington case to compel the agency's response to the Corps that the project was inconsistent. This response from the State would result in a suspension of Corps authority to issue the permit under the CZMA unless the Secretary of Commerce determined the project was in the national interest or consistent with CZMA objectives.

The issue in this case concerned the State agency's authority to remain silent on the pending application. The State court decided that the State agency had an affirmative duty to respond to the Corps notice. It was not permitted to remain silent, thus permitting, under the consistency provisions, a conclusive presumption of consistency to result at the end of a six-month period. The court further held that the duty to respond arose at the earliest practicable time the State agency was able to respond to the notice.

III. CASE ANALYSES

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION PROPOSED WESTERN REGIONAL CENTER SITING AT SAND POINT

INTRODUCTION

Discussion of the application of §307(c)(1) of the CZMA arose in the course of planning for a construction project by the National Oceanic and Atmospheric Administration (NOAA) in Seattle. NOAA proposed to site its Western Regional Center in a geographical area known as Sand Point on the west shore of Lake Washington. Plans called for the dredging of lake bottom and substantial filling for pier construction for the moorage of ocean-going research vessels at the site.

Area residents have been generally hospitable to the presence of NOAA at Sand Point. It is recognized that the research center would be an important asset for the region, providing jobs and a marine sciences campus that is likely to win prestige. However, the vessel moorage feature has been met with opposition from community groups interested in retaining the predominantly residential character of development around the lake.

A memorandum prepared by a State Department of Ecology (DOE) official suggests other factors which may have influenced public opinion on the subject (*see* paragraph 17, below)*. Lake Washington was subject to a multimillion dollar sewering project which resulted in a significant improvement of water quality in the lake. Consequently, area residents are proud of the lake and anxious to protect it from influences that might tend to degrade its relatively pollution-free state.

*Numbered paragraphs refer to correspondence, documents or events described in the appendix following.

NOAA's decision to site the research center at Sand Point was challenged in a law suit. A preliminary injunction halting construction was ordered when the federal court held that plaintiffs were likely to prevail in their arguments attacking the environmental impact statement. Save Lake Washington v. Frank, #C77-914M (D.C.W.D. Wash.) February 16, 1978 (unpublished opinion).

CONSISTENCY ISSUES RAISED

A. NOAA's compliance with consistency provisions despite their questionable application to the Sand Point proposal.

Two arguments support the conclusion that the consistency provisions may have a very limited application to the NOAA proposal for construction at Sand Point. Both of these arguments appeared to emerge in discussions between NOAA and DOE on the subject of consistency requirements. First, the construction was proposed for federal lands, and thus, the excluded lands provision would make consistency necessary only insofar as the project "directly affect[ed]" the coastal zone beyond the boundaries of the excluded lands. This argument would not completely eliminate consistency application because some bedland areas to be used in pier construction are state-owned.

The second argument rests upon a determination of the boundaries of the coastal zone. These boundaries are to be defined by the coastal state (*see* CZMA §304(b)(1), 16 U.S.C. §1454 (b)(1)). The boundary definition in the Washington Coastal Zone Management Program reads:

> "The Washington State coastal zone management area embodies a two-tier concept. The first or primary tier, bounded by the 'resource boundary,' is that area legislatively defined by the Shoreline Management Act of 1971; that is, all of the state's marine waters and their associated wetlands, including at a minimum all upland area 200 feet landward . . . The second tier, bounded by the 'planning and administrative boundary,' is composed of the area within the fifteen coastal counties which front on saltwater." p. 119 (emphasis supplied.)

The waters of Lake Washington are not "marine waters" so the Sand Point site is within the "second tier" of the coastal zone, because Lake Washington is wholly within a coastal county. Presumably, consistency would apply more strictly to construction projects in the "first tier."

NOAA and DOE personnel involved in a meeting on January 24, 1977 at NOAA's initiation (para. 10) concluded that consistency may only apply if there are "first tier" impacts. Impacts upon the first tier would result from vessel traffic, and NOAA indicated that all but two of the ships proposed for moorage were already traveling the same route through the coastal zone to moorage at NOAA's current site on Lake Union. (*See* memo prepared by Don Peterson, DOE, dated January 26, 1977, para. 10.)

Nevertheless, NOAA prepared a consistency certification which was then submitted for inclusion with the Corps §10 permit application. Although the above arguments could have been asserted, NOAA's actions appeared to indicate that the provisions did apply. The consistency certification provided to the Corps did not evaluate the question of applicability of consistency, rather it stated that the project, as proposed, was consistent. Furthermore, the statement did not mention the first tier impacts (i.e., vessel traffic) discussed by NOAA and DOE in the January 24 meeting, despite the parties' apparent conclusion that only these impacts would be subject to consistency. The Corps §10 permit was concerned with dredging and water-related construction for the project.

NOAA had another opportunity to assert arguments that consistency did not apply to the Sand Point proposal in the Save Lake Washington v. Frank case. (*See* para. 21.) Once again, it did not do so. NOAA defended against the plaintiff's claims by relying on its position that the project was consistent with the Seattle master program and therefore with Washington's program. One might speculate that NOAA chose to argue the consistency of its actions, and not the inapplicability of consistency, to promote the appearance of full and cooperative compliance with the substance

of Washington's program. Such choice is understandable in view of NOAA's role as the agency primarily responsible for coastal zone management.

In contrast, DOE on several occasions clearly indicated that the consistency provisions would not apply to the Sand Point proposal. *See* para. 15 (letter to private individual indicating that the project "is a federal project on federally-owned land."); and para. 14 (letter to Corps of Engineers indicating the site was not in the coastal zone and not subject to the Washington program). There is no indication that DOE contemplated developing a position that consistency should apply. For example, the state agency has expressed its disagreement with OCZM's adoption of an expanded definition of the excluded federal lands provision. DOE could have argued that consistency did apply since some of the affected bedlands were on state lands, or it could have insisted that the vessel traffic which the Western Regional Center would bring would have significantly affected the coastal zone, requiring a consistency finding by NOAA. The development of such arguments would require interpretations the State agency was unwilling to make absent serious controversy, especially prior to the adoption of final regulations implementing §307.

B. Emphasis upon local master program as the definitive reference for NOAA consistency review.

The State DOE has not played an active, continuous role in the consistency review process in which NOAA attempted to meet its consistency responsibilities. NOAA had made formal inquiries of DOE on the subject of consistency (*see* paras. 6 and 20). But it placed major emphasis upon the determinations of the local permitting authority, Seattle Office of Community Development.

NOAA's discussions with DOE identified the broadest issues to be settled: whether the project was in the coastal zone, status of bedlands, etc. DOE's own review of the proposal raised some serious issues, principally the project's harmony with the policies for "shorelines of state-wide significance." *See* WCZMP at 29-31 and para. 12 (draft prepared at DOE indicating the project would not be in full compliance with those policies). DOE is a more appropriate proponent of the shorelines of state-wide significance policies than is the local permitting authority, although local governments are encouraged to apply the policies. It appears that NOAA and DOE did not fully resolve their difficulties about the application of these policies, but instead, concluded that NOAA was not bound by them. DOE's subsequent actions support this assumption. *See* para. 14 (letter to the Corps of Engineers).

By contrast to the general discussions between DOE and NOAA, the more frequent contacts between NOAA and Seattle Office of Community Development have dealt with the substantive requirements of the Seattle local master program. In a telephone conversation on January 27, 1978, Robert Hintz, Director, Office of Community Development said that his office had frequent informal telephone contact with local NOAA officials. He provided one example of a topic discussed: NOAA had been concerned that a proposed building placement would be in violation of master program regulations.

NOAA's efforts to insure the consistency of its proposal included initial consultation with DOE on "larger" issues, i.e., whether or not consistency would even apply. It then engaged in a continuing relationship with the local permitting authority regarding project details. After

the adoption of the Seattle master program, NOAA regarded that program as the primary source for determining the consistency of the project. In Save Lake Washington v. Frank, NOAA answered the inconsistency charge by arguing its compliance with the Seattle master program.

C. Consistency review for vessel traffic impacts of the Western Regional Center construction.

As described above, NOAA and DOE agreed that construction of the Center at Sand Point might result in effects upon the coastal zone beyond the construction site: specifically, the parties agreed that vessel traffic would increase since more NOAA ships would travel through Puget Sound to moorage at the site and that this might require a consistency determination. NOAA and DOE appeared to contemplate that §307(c)(1) might apply to the moorage of ocean-going vessels at Sand Point. Their discussions considered whether the impacts upon the coastal zone of increased vessel traffic would constitute a direct effect upon the coastal zone.

NOAA may have concluded that this vessel traffic impact did not require consistency review because only an additional two ships would be traversing the coastal zone after Sand Point construction. (*See* DOE memo, para. 7.) It may have been concluded that this additional traffic was too insignificant an impact to merit attention. Recently adopted federal regulations implementing §307 provide that only Federal activities "significantly affecting" the coastal zone require review. 15 C.F.R. §930.34(a). This presumes that only new activities, expansion, or changed activities require §307(c)(1) consistency review. However, the new regulations also provide that consistency determinations are required for existing federal activities "initiated prior to management program approval." 15 C.F.R. §930.38

(emphasis supplied). It would then be appropriate for NOAA to judge the consistency of the total vessel traffic on the coastal zone, not just the incremental increase. On the other hand, the federal agency may have fully considered the coastal zone impacts of its activities existing at the time of program approval because all federal agencies are urged to work closely with the state in arriving at a program.

Furthermore, although the land areas were clearly excluded federal lands, the bedlands where piers were to be constructed were state-owned, at least in part, which offered some basis for the application of SMA policies for shorelines of statewide significance. DOE analysis of the substantive application of these policies had revealed potential consistency problems. (See para. 12.)

D. Application of the Lake Washington Regional Goals and Policies (LWRGP) for consistency determination purposes.

Part B above discusses NOAA's use of the Seattle master program to assess the consistency of the Sand Point project. It was not always clear that this primary source was definitive on the consistency issue. The plaintiffs in Save Lake Washington v. Frank argued that the Lake Washington Regional Goals and Policies (LWRGP) must be considered as well. Those policies included a provision banning the expansion of ocean-going vessel traffic and moorage on the lake.

Although the local permitting authorities in the Lake Washington region were directed to incorporate the LWRGP, Seattle did not do so. In its review of the Seattle program proposal, DOE remarked upon the failure to incorporate the ocean-going vessel limitations. DOE did not insist that the limitation be included as a condition of program approval. *See* para. 9. Arguably, these circumstances could result in challenge to

the state administrative process in which the Seattle program was approved. However, this tactic was not adopted in Save Lake Washington v. Frank.

NOAA stressed that the Seattle master program had replaced the LWRGP. This argument was essential for NOAA's position in Save Lake Washington v. Frank. In an affidavit presented to the court in that case, Robert Knecht , at OCZM, declared:

> "Pursuant to OCZM's policy at the time of the Washington State approval, we regarded local master programs once approved by the state as integral parts of the approved state coastal zone management program. The Seattle Master Program represents the state's policy on regulating shoreline uses for that portion of its coastal zone which includes the area of Sand Point (out to the harbor line), superseding the policy referred to in Mr. Stang's memorandum of August 25, 1975." *See* para. 23 .

Magistrate Weinberg's preliminary report supports the proposition that prior to the adoption of the Seattle master program, NOAA should have consulted the LWRGP and discussed those policies in its EIS , yet his report clearly reflects the position that once the Seattle program was adopted, it was the source for determining consistency. The report attaches weight to the fact that the Seattle permitting authority itself agreed with the consistency determination made by NOAA. Knecht's affidavit and other NOAA arguments apparently influenced Judge Neill's conclusion that a discussion of the LWRGP was unnecessary because NOAA had complied with the local program.

E. Scope of consistency review of the NOAA proposal.

The certification provided by NOAA to the Corps discussed the most important impacts of the immediate construction of the Sand Point installations: dredging required, features of underwater support for the piers, dredge spoil disposal, etc. Discussion of such details is well suited

to the Corps §10 permit process because that process aims at the regulation of activities affecting navigation and environmental pollution in the immediate area of the site. Referral to the local master program reviewing the consistency of such construction details is a suitable approach for the federal agency because the local programs include guidelines for the evaluation of construction features. Referral to the state program and coordination with DOE are more appropriate for consistency review of broader issues, like siting and compliance with policies for areas of particular concern.

A more comprehensive look at consistency issues is advisable at the time of the environmental impact statement. Magistrate Weinberg's report faulted NOAA for its failure to discuss the LWRGP in its EIS on the project (dated January, 1976). This point was not adopted by Judge Neill in his order restraining construction at Sand Point. The Court found "the question of such compliance (with LWRGP) is now moot" because the Seattle program was deemed to have superseded the LWRGP.

Consistency discussion within the EIS is likely to alert the public and interested agencies that the contemplated action may affect the coastal zone. The application of the CZMA and the significance of coastal zone effects were genuine issues in this case. Increased discussion of such issues is likely to spur federal agencies to a more vigorous consistency review.

APPENDIX: CHRONOLOGY OF EVENTS AND CORRESPONDENCE

1. January 31, 1975. Draft environmental impact statement (DEIS) on the project published.

2. March 11, 1975. Letter from DOE to the State Office of Program Planning and Financial Management. In response to the DEIS on the Sand Point project, DOE noted that there were possible inconsistencies between a Lake Washington Regional Goals and Policies (LWRGP) recommendations and the expansion of moorage for ocean-going or commercial ships on the lake. The LWRGP had been adopted by a multi-jurisdictional advisory body convened to coordinate planning for Shoreline Management Act (SMA) purposes among the various local shoreline permitting authorities surrounding the lake. The letter urged that the final EIS should recognize the increased danger of pollution to the lake. A more detailed weighing of alternatives was suggested in view of the environmental preference for expanding NOAA Lake Union facilities rather than initiating Lake Washington development.

3. August 25, 1975. Interoffice memorandum, NOAA. This memo expressed concern with NOAA's decision to moor ocean-going vessels on Lake Washington, noting that the moorage would be "inconsistent" with the LWRGP.

4. January, 1976. Final environmental impact statement (FEIS) issued.

5. February 24, 1976. Letter from Grant Dehart, NOAA, Washington, D.C., to Robert Griffith, Sand Point Project Coordinator, NOAA, Seattle. This letter contained general comments on the Sand Point FEIS discussion of the CZMA urging NOAA to continue consistency discussions with Seattle

and DOE. It states that the "Sand Point facility will fall within the State's defined coastal zone if approved."

6. April 13, 1976. Letter from Griffith, NOAA, to John Biggs, Director, DOE. This correspondence requested DOE's opinion regarding the application of the CZMA consistency provisions to the NOAA proposal. It observed that although the land was under exclusive federal legislative jurisdiction, some water areas were not. The NOAA official further requested an opinion as to the project's consistency with the proposed Washington Coastal Zone Management Program (WCZMP) which had not been given final approval at that time.

7. April 21, 1976. Interoffice memo, DOE. This memo was prepared to guide response to NOAA's April 13 request. The analysis provided indicated that the Sand Point project would be in the "second-tier" of the Washington zoastal zone, and, therefore, not subject to consistency requirements of §307(c)(3). However, it was noted that increased shipping through the Montlake Cut connected to the lake might involve a direct effect upon the first tier, in which case consistency would be required. However, it also stated that only two additional ships would traverse the first tier to get to Sand Point since all but those two were then moored at Lake Union which is connected to Lake Washington by the Montlake Cut and also in the second tier. The memo also noted that the LWRGP recommended against expanding commerical and ocean-going vessel traffic on the lake. But it observed that the Seattle master program did not reflect the LWRGP. The memo recommended that DOE inform NOAA that the project was not subject to state jurisdiction, but

suggested meeting with NOAA officials to encourage maximum mitigation of harmful environmental effects.

8. June 1, 1976. WCZMP approved.

9. June 30, 1976. Letter from DOE to Seattle Department of Community Development. This letter reviewed the shoreline master program submitted by the city. The proposed master program was given high praise by DOE. However, it was observed:

> "The administrative complex, ship berthing facility and many of the activities proposed to be carried on by the National Oceanic and Atmospheric Administration (NOAA) are not consistent to the Lake Washington Regional Shoreline Goals and Policies. As a federal facility located on federal lands, these proposals and activities are probably not strictly subject to the provisions of the State Shorelines Act nor are they subject to the requirements of the Coastal Zone Management Program.
>
> It would, however, appear that NOAA should in every way carry on its activities in a manner which is to the utmost degree possible, consistent with the provisions and spirit of the state's Shoreline Act, and that these activities should be as closely as possible related to the requirements set forth in the Seattle Master Program.
>
> To this end, we urge that some joint city-state-federal task force be appointed and charged with the responsibility of continually reviewing NOAA activities in the interest of bringing them as nearly as possible in conformity with the Seattle Shoreline Master Program and the State Shoreline Management Act."

10. January 24, 26, 1977. File memos, Emily Ray and Don Peterson, DOE. These memos summarized the results of a meeting on January 24 between staff members of DOE and NOAA in which the applicability of federal consistency to the Sand Point project was discussed. Ms. Ray observed that NOAA was anxious not to compromise any CZMA requirements and thereby set a precedent for other federal agencies in dealing with the state on consistency matters. All parties agreed the project was not in the first tier but that increased vessel traffic could result in first tier impacts.

There was some discussion of the LWRGP but no clear resolution regarding its applicability to the project. NOAA expressed its intent to mention consistency in the pending Corps §10 permit application. One memo also mentioned NOAA negotiations with the Department of Natural Resources (DNR) regarding state-owned bedlands.

11. January 27, 1977. NOAA submitted a consistency statement on the project to the Corps. The §10 application had been submitted on January 15. The statement asserted that the proposed activity "complies with Washington Coastal Zone Management Program and the regulations of the Seattle Shoreline Master Program . . ." The statement reviewed the policies for development of "shorelines of statewide significance," indicating project consistency with each. Lake Washington is designated a "shoreline of statewide significance" in the Shoreline Management Act (SMA).

Regarding the Seattle master program, the statement described ways in which aquatic life would be protected to the maximum extent possible. It claimed that there would be no adverse effect upon nearby uses nor would there be interference with public use of the shoreline. It was also claimed that the proposed dredging was "not contrary to the general intent of the Seattle" program and is a "water-dependent use."

12. February 3, 1977. Draft memo Miriam Laukers, DOE, to Don Peterson, DOE. Laukers analyzed the details of the NOAA proposal for consistency with the applicable Seattle master program. Few inconsistencies with the local program were noted. However, several inconsistencies with criteria for development of shorelines of statewide significance were discussed.

13. February 10, 1977. Interoffice memo, Emily Ray, DOE. Ms. Ray indicated that the Port of Seattle was contesting issuance of the Corps permit in view of the unresolved issue of use of the bedlands. The Port argued that NOAA must pay compensation for such use.

14. April 14, 1977. Letter from DOE to Seattle District Engineer, Corps of Engineers. DOE commented upon the permit application pending before the Corps on the Sand Point project. DOE indicated that it had "no objection" to the project and stated: "This project is not in the coastal zone, and therefore, is not subject to the Washington State Coastal Zone Management Program."

15. July 19, 1977. Letter from Wilbur Hallauer, DOE, to Marr Mullen, a private citizen. In response to a letter expressing disapproval of the project, the DOE director wrote that although the project was inconsistent with LWRGP, it was "a federal project on federally-owned land" and, as such, would not be subject to the direct authority of the SMA and WCZMP.

16. August 10, 1977. Letter from Acting City Manager, Mercer Island, to DOE. This letter conveyed to DOE a resolution of the City Council of the City of Mercer Island (located on the island of the same name south of Sand Point in the lake) that the NOAA proposal violates the LWRGP.

17. August 19, 1977. Interoffice memo, DOE. This memo summarized other factual background to the controversy. It described the cleanup of Lake Washington that resulted from an extensive sewage project several years ago. It predicted that moorage of NOAA vessels would have some adverse impact on water quality as a result of inadvertent spills

and for that reason would be opposed by citizens groups. Impacts of dredging and spoils run-off were also discussed.

18. September 15, 1977. Letter from Roger Leed, Seattle attorney, to Richard Frank, NOAA. In this letter, Leed, a private attorney for Save Lake Washington, a citizens' group, informed Frank that he had reviewed the FEIS for the proposed Western Regional Center and advised his clients that legal deficiencies existed which could be sufficient to support injunctive relief. Leed asserted that the decision-making processes of NOAA were not in compliance with National Environmental Policy Act (NEPA) requirements. The main objection was NOAA's failure to adequately consider alternatives. He cited a Congressional staff memo considering appropriations for the project which concluded that alternatives to Lake Washington siting had not been adequately considered.

19. September 27, 1977. Corps sec. 10 permit issued.

20. October 10, 1977. Memo from James Hornell, Seattle Community Development, to Dale Gough, NOAA, Seattle. In this memo, Hornell evaluated the consistency of the Sand Point project with the Seattle shoreline master program. The conclusion was that the project, as proposed, was consistent with the Seattle program.

21. December 20, 1977. Save Lake Washington filed suit against NOAA, the Corps and the General Services Administration in U.S. District Court in Seattle. The complaint alleged violation of NEPA in the proposed siting of the Western Regional Center at Sand Point. It further alleged that the decision-making processes used were contrary to NEPA requirements and that the FEIS was defective. It also claimed that §§303 and 307 of the CZMA had been violated in view of the regional

policy prohibiting the expansion of ocean-going and commercial vessel moorage on the lake. The complaint stated that the Corps had violated its own regulations which require it to consider local zoning requirements before issuing dredging permits. Injunctive and declaratory relief were requested.

22. February 13-15, 1978. Hearing conducted before U.S. Magistrate John L. Weinberg by parties in the Save Lake Washington v. Frank case on plaintiffs' motion for a preliminary injunction halting construction pending the resolution of the merits of the case.

23. March 15, 1978. U.S. District Judge Marshall Neill issued the requested injunction, basing his decision upon Magistrate Weinberg's report and decision on the motion proceeding. In that report, dated February 16, 1978, it was concluded that plaintiffs were likely to prevail on several arguments attacking the environmental impact statement. Specifically, NOAA had failed: (i) to disclose and consider navigational hazards; (ii) to adequately consider alternatives; and (iii) to disclose conflicts with the LWRGP. The last finding was not adopted by Judge Neill, for reasons indicated below.

Judge Neill had conducted a final hearing on February 24, 1978, during which the issue of compliance with the LWRGP was again considered. The Court determined that the question of compliance with the LWRGP was moot, apparently relying on an affidavit of Robert Knecht, Acting Assistant Administrator for Coastal Zone Management, NOAA, in which he asserted that the LWRGP had been replaced by the Seattle local master program.

The Magistrate's report considered plaintiffs' argument that the Western Regional Center plan was inconsistent with the Washington Coastal

Zone Management Program, and was therefore in violation of the CZMA. It observed that the Washington Program "consists of the Shoreline Management Act" and local master programs adopted under it. The report determined that since the applicable master program of the City of Seattle specifically contemplated NOAA's development on the site, there was no inconsistency. The report appeared to attach some significance to the fact that the Seattle Department of Community Development (the local permitting agency) had informed NOAA of the consistency of its plans.

The final order, then, adopted Weinberg's report and its recommendations, except insofar as it would require NOAA to discuss the LWRGP.

24. May, 1978. NOAA continued to collect information about alternatives for EIS revision.

U.S. NAVY ACTIVITIES IN WASHINGTON

INTRODUCTION

The Navy is a heavy user of Washington coastal zone resources. The state's location and the abundance of natural harbors along the shoreline are suitable for many Navy purposes. Navy presence in the state has been significant for some time, and with the 1974 decision to locate the Trident nuclear submarine facility at Bangor, that presence will become all the more noticeable.

Development of the Washington Coastal Zone Management Program was of special interest for the Navy, especially in view of the Trident project. The consistency provisions prompted much concern because it was perceived that the State might acquire a means to curb the Navy's uses of the coastal zone.

CONSISTENCY ISSUES RAISED

A. Pre-approval negotiations between Navy and DOE over content and procedures of the coastal zone management program.

The Navy uses Washington coastal areas for many purposes. A decision had been made in August, 1974, to locate the nation's first Trident submarine base on the Washington coast. For these reasons, Navy was keenly interested in the Washington program and desirous of playing an influential role in its development. As a result, much debate, negotiation and compromise took place between the Navy and the state DOE prior to the final approval of the Washington Coastal Zone Management Program on June 1, 1976. This activity was undoubtedly generated by the impending operation of the consistency provisions once the program received approval.

Early contacts between Navy and DOE reveal a very active attempt to ascertain how the Washington program might affect naval operations. (*See* para. 2.) The Navy assumed two approaches to reconciling its activities in Washington State to the requirements of the CZMA and Washington's evolving program. First, it argued for advantageous interpretations of key provisions of the CZMA to lessen the limitations on its affairs. The meaning of the excluded federal lands provision merited the most attention in this regard. (*See* Navy memo on Department of Defense comments on proposed Washington program, para. 10.) The Navy also sought to maximize its influence at all stages of the State planning process.

The Excluded Lands Issue.

The Navy and DOE disagreed on the meaning of the excluded federal lands provision (16 U.S.C. §1453(1)). The Navy urged that all property

under its control should be excluded from the program regardless of its ownership or jurisdictional status. (*See* para. 10.) The state, however, argued that only those lands subject to the exclusive legislative jurisdiction of the Federal government should be excluded. This definition would result in the inclusion of a major portion of lands used by the federal government within the coastal zone.

The Navy's objections to the State's position contributed to the decision to postpone final approval of the Washington program until 1976. Naval objections were withdrawn when the state agreed to abide by the broad definition of excluded lands urged by the Navy and other federal agencies.

The issue was submitted to the Department of Justice for clarification. The result was a determination that lands "owned" by a federal agency would be excluded. This interpretation was later broadened to include lands leased or used by a federal agency. The state was not satisfied with this result and has brought suit in federal court for a judicial resolution of the matter. Washington v. Kreps, #C78-223V, D.C. (W.D. Wash.) (Filed April 10, 1978).

Increased Navy Input.

In the very early stages some Navy personnel insisted that the unique importance of Navy's mission should exempt it from full compliance with Washington's program. (*See* para. 2.) Thereafter, the Navy adopted a new approach of asserting its position to the state during planning. It attempted to receive formal recognition in the program of existing Navy uses of the coastal zone and a "positive declaration of the priority of national defense and the importance to the state of the Navy's presence in the coastal zone along with stated procedures to implement that objective." (*See* para. 6.) In essence, the Navy asserted that the final

planning product should reflect a positive commitment by the state to promote Navy use of the coastal zone.

The final document does contain some of the positive assertions urged by the Navy. The state had indicated that such assertions would not be necessary because the program policy of assigning priority to uses of regional benefit and uses dependent upon coastal locations would be sufficient to insure that the Navy's present and future uses would be accommodated. (See para. 7.)

In response to Navy criticism that it and other federal agencies had not been actively involved in the planning process, DOE also suggested that the Navy review local master programs prior to state approval. (*See* para. 7.) A frequent comment made by the Navy after review of local plans was that there was no positive language in each stating that the local permitting authority would regulate areas adjoining Naval property to insure the "usability" of Navy land. This reveals an approach to understanding coastal planning and consistency as a means for federal agencies to promote their own uses over competing uses in the coastal area. Another frequent comment was that each local master program should include a positive statement accommodating Navy.

DOE was more successful in avoiding explicit commitments to the Navy in the local programs than in the Washington CZMP documnet. The agency indicated that it too was interested in encroachments on existing Navy uses but indicated that the program machinery would preclude such a result without such a declaration in each individual local program. DOE observed that specific references to the Navy or other federal agencies would be cumber-

some and meaningless additions to local master programs.

B. Local master program classifications of Navy property.

The Navy objected to the classification of its lands within the local master programs. At least one local master program presently classifies federal lands. DOE argued that even if all Navy lands were excluded from the coastal zone the state should be permitted to classify these lands for three reasons:

(1) The Navy would have no means of accomplishing review of its actions for consistency with CZMA unless its lands could be fitted into the framework used by the state to evaluate non-federal projects.

(2) Classification would foster "adjacent use complementarity," i.e., Navy development on its lands would remain in closer harmony with development on adjacent non-federal lands.

(3) Any future disposition of Navy lands out of federal control would not then necessitate a spot classification decision.

The Navy argued that classification might "encumber future base development" and "conflict with various federal laws governing disposal of federal property." Fears were expressed that classification would lead to a public expectation that the Navy abide by the planning scheme in the same manner as a private party.

The Navy has apparently ceased to object to the classification of its lands. It is collecting information about land use classifications and Washington coastal zone resources as part of its general effort to predict and minimize constraints upon its operations in the state.

C. Trident construction: procedural and substantive aspects of Navy consistency review.

A comprehensive assessment of the coastal zone consistency of locating the Trident submarine base on Hood Canal was never undertaken. However, the decision was made in 1974--almost two years before the final approval of the Washington Coastal Zone Management Program. DOE did object to the project at one time indicating that the state "was not afforded an opportunity to review the entire project." This criticism apparently referred to the state's lack of opportunity to conduct a coastal zone consistency review, because the agency then claimed that project construction would not be consistent with the proposed Kitsap county local master program for the area. The Navy argued that the state had had ample opportunity to review the EIS prepared on the project. In any event, the issue question of the consistency of the entire project was never addressed independently, nor did the parties discuss whether such comprehensive review would have been necessary had the decision to locate been made after final program approval.

The parties did, however, address the need for consistency review of individual construction phases in the overall project. Agreement was reached that consistency review would accompany Corps §10 permit for construction of a magnetic silencing pier. The Navy included within that application a certification that the pier was consistent with the CZMP. Since that time, a few other applications have contained similar statements. The Navy apparently assumed that such certification would be necessary under §307(c)(3) because that provision is cited in the certifications. This assumption contemplates that federal agencies are included as "applicants"

under that provision, contrary to the current regulations. 43 Fed. Reg. No. 49, 10523-10524, Monday, March 13, 1978 (to be codified at 15 C.F.R. §930.52). As far as can be determined, there have not been any more such applications processed since mid- to late-1976. Thus, it is not clear if the procedure described here will continue to be used.

There appeared to be a lack of clarity about how the substantive consistency review would be accomplished. Both the state agency and the Navy relied somewhat on the applicable local master program for this purpose. (*See* para. 9 (DOE discusses consistency of refit pier with proposed Kitsap County local master program) and para. 11 (Navy indicates local permitting authority reviewed various construction phases and commented regarding consistency with the local program.)

In addition, the policies for shorelines of statewide significance were also consulted by Navy and DOE. Analysis of these policies appeared to be the only review step undertaken by Navy for the magnetic silencing pier. (*See* para. 20.) Interpretation of these policies resulted in disagreement between the Navy and DOE during the magnetic silencing pier application. The Navy had stated that pier construction would be consistent with the Washington program. DOE objected, arguing that the policy of improving local access would be frustrated. (*See* para. 21.)

D. State's threatened declaration of inconsistency to win concessions from Navy.

A comparison of correspondence from DOE on the issue of the consistency of the Trident project reveals a marked change of position on the issue. In his letter to Rear Admiral Zech, dated May 29, 1975 (*see* para. 5.)

DOE Director Biggs expressed much deference to Navy decisions to locate in the coastal zone:

> "The actual task of selecting operating areas for submarines, however, is one that the Navy would perform itself. Our role in this example would be to assist the Navy in maintaining its submarine operating areas by preventing events that could reduce or eliminate the useability of the areas. To this end we would alert the Navy of any adverse proposal that other coastal zone users might encounter, and then work with the parties to resolve conflicts."

Less than four months later, Biggs criticized the Navy for its failure to involve the state in the Trident planning process and flatly stated that the construction of the base would be inconsistent with the proposed local master program. (*See* para. 9.)

The Navy response to this letter pointed out the marked change of attitude of the state agency. The threat of state resistance did, however, result in increased efforts by the Navy to meet state criticism. Personnel from Navy and DOE then met to discuss mitigation of environmental damage on the project. DOE indicated its satisfaction soon thereafter. It is unclear what influence the consistency provisions may have had in influencing Navy's response. These events occurred between the time of tentative approval of the WCZMP and its final approval in June, 1976. Navy strenuously denied DOE assertions about the application of consistency but steadfastly asserted its intentions of working together with the state agency to reach resolution.

APPENDIX: CHRONOLOGY OF EVENTS AND CORRESPONDENCE

1. August, 1974. The U.S. Navy decided to locate "a complete logistical support/refit facility" for its Trident submarines at Bangor, Washington, on Hood Canal. The decision came after extensive study, environmental impact assessment and consideration of alternative sites. For a more detailed chronology of events leading to the selection of Bangor as the "dedicated site." (*See* Concerned About Trident v. Rumsfeld, 555 F.2d 817, 820-822 (D.C. Cir. 1976).)

2. March 3, 1975. Meeting attended by Navy and DOE personnel. Apparently this was the first formal exchange between the Navy and DOE on the subject of coastal zone planning implications for Navy operations in the state. At this meeting a Naval official asserted that its national defense mission would exclude the Navy from the compliance of the WCZMP.

3. March 12, 1975. Letter from DOE to S. O. Dumas, 13 th Naval Dist., Seattle. In this letter, a brief summary of the range of Navy uses of the Washington coastal zone was provided and the relationship between Navy and the state program was discussed. The expectation that the Navy should promote environmental concerns was expressed, and the state's responsibility to consider national defense interests was mentioned.

4. Early 1975. DOE submitted the proposed Washington Coastal Zone Management Program to the Navy for comment. The Navy responded with a list of specific concerns including a desire to be more actively involved in the planning process. Other major concerns were the program's failure to address the accommodation of future Navy use of Washington shoreline resources and its failure to assign priority to Navy use.

Rear Admiral Zech also wrote DOE commenting on the proposed program He commented upon perceived shortcomings: no positive declaration of the priority of national defense, no mention of the importance of the Navy for the state.

5. May 29, 1975. Letter from Biggs, DOE, to Zech, 13th Naval Dist. In response to Zech's concerns, the DOE director assured him that more concerted efforts would be made to involve the Navy in planning. Specifically, the Navy would be asked to comment on local master plans. The letter also expressed DOE's desire to open lines of communication with the Navy for addressing and resolving coastal zone management problems. Regarding accommodation of future uses of the coastal zone, Biggs observed that DOE recognized the Navy's continuing needs; he pledged to work to resolve through coastal zone management conflicts. The letter responded to the Navy's concern that its uses be given formal priority by noting that the program's policy of promoting uses of regional benefit and uses requiring coastal locations would achieve the same result. In addition, the letter stated that DOE recognized the Navy to be the sole organization capable of making some of its site selection decisions. DOE promised to assist in preventing occurrences which would undermine the "usability" of Navy installations.

6. July 28, 1975. Letter from Dunn, 13th Naval Dist., to DOE. In this letter, the Navy urged DOE to respond to Corps public notice of the Navy's §10 application for construction of Trident "refit pier #1." Notice had been published in the spring of 1975 for this massive structure. The letter indicated that DOE personnel who had visited the site "expressed concern" over the project.

7. August 14, 1975. A meeting occurred involving personnel of the State DOE and Bureau of Outdoor Recreation and the Navy. Its subject was "use of Navy property for public recreation." State agencies were concerned about the restriction of public use of Hood Canal as a result of Trident. DOE's attention to this subject resulted from its review of the Corps §10 permit submitted by the Navy for refit pier #1. It was observed that the state's goal of promoting public access to shorelines of statewide significance including Hood Canal was frustrated by the Trident project. The state agencies requested that the Navy open up other of its Hood Canal lands for public use. Naval personnel argued that this had been done. The meeting ended with a DOE's promise to respond to the Corps public notice for refit pier #1.. DOE was also to come up with a more specific proposal for expanding recreational opportunities with the expectation that the Navy would cooperate toward that end.

8. September 5, 1975. NOAA reaction to Department of Defense (DOD) comments on the proposed Washington program. Major points:

a. With regard to Navy comment that the proposal did not adequately acknowledge national security requirements, Navy should likewise respect the intergovernmental cooperation requirements of the CZMA. Both the Navy and the state must accept a shared responsibility.

b. With regard to the exclusion of federal lands: OCZM noted that the precise meaning of the exclusion was under study by the Justice Department, but urged DOD to recognize that federal lands exclusion did not permit federal agencies to ignore the effects of their activities and developments on the coastal zone.

9. September 18, 1975. Letter from DOE to Dist. Engineer, Corps of Engineers. In this letter, the DOE indicated that the state would not approve the issuance of Corps §10 permit for refit pier #1 construction. DOE observed that pier construction would result in the "loss of substantial public rights of navigation" and would destroy beach access and fish and game resources. Furthermore, the pier would not be consistent with the proposed local shoreline master program.

The letter stated that federal agencies were required to receive "state authorizations" for projects having an environmental impact. In support of this proposition, DOE cited National Resources Defense Council v. Calloway, and §307(c)(2) of the CZMA. In addition, it criticized the Trident EIS for not providing an adequate overview of the project and not giving the state sufficient opportunity to comment during the design stages of the project.

10. October, 1975. 13th Naval Dist. memo to Chief of Naval Operations. This memo was pertinent to the continuing discussion between DOE and OCZM regarding the proposed WCZMP.

This 6 page memo reviewed developments in Navy-State negotiations on WCZMP planning. It noted correspondence from DOE. (*See* para. 9.) It commented that the state had "reversed its intentions of developing and administering a WCZMP that would permit the Navy to perform its mission." Other areas of disagreement were listed and discussed briefly.

11. October, 1975. Letter from Dunn, 13th Naval Dist., to Biggs, DOE. The Navy responded by vigorously objecting to DOE's letter of September 18, para. 9, above. It denied that state authorization was necessary before construction of the refit pier could begin.

It maintained that DOE's characterization of the EIS for the project was inaccurate, citing its adherence to published regulations regarding the proper scope and content of such an EIS. The Navy claimed that DOE had ample opportunity to comment in the EIS at various stages of planning. Furthermore, the Navy argued that the local shoreline permitting authority had not indicated that the refit pier was inconsistent, as the DOE had asserted in the September 18 letter.

12. November 12, 1975. Letter from Cameron, DOE, to District Engineer, Corps of Engineers. The letter stated that the Navy had "conducted a comprehensive briefing and inspection" to insure maximum mitigation of harmful environmental effects. It also stated that DOE had no further objections and would "withdraw" the September 18 letter. *See* para. 9.

13. November 18, 1975. Letter from DOE to Rear Admiral Zech. The content of this letter indicates that an October 30 tour of the Trident site by DOE personnel had satisfied the department with construction plans and procedures. DOE again assured Zech of its intentions to recognize national security in its implementation of the coastal zone management programs. It also acknowledged that because the WCZMP had not received final approval, it could have no legal effect upon the issuance of the §10 permit.

14. December 29, 1975. Letter from Peterson, 13th Naval Dist., to Laukers, DOE. This letter contains an example of Navy comments on a specific local master program, that of the City of Poulsbo. DOE had agreed to seek

Navy comments on local master programs that might have significance for its operation. (*See* para. 5.) The letter suggested that the following changes be made in the plan:

a. Program should include a discussion of the "interface" of the local plan and the state program.

b. Program should define the coastal zone boundaries.

c. It should include a positive statement accommodating the Navy.

d. It should include a positive statement that one program intent is to prevent encroachments on the "usability" of Naval facilities in the coastal zone.

e. It should acknowledge that property under control of the Navy is excluded from the coastal zone.

f. It should indicate that no federal agency is required to obtain a permit for developments on federal property undertaken by the federal agency.

g. It should state that any consistency conflicts involving federal agencies is within the purview of the state DOE and not the local authority.

h. It should state that questions of permissible uses of the bedland areas are within the jurisdiction of DOE and not the local authority.

15. December 29, 1975. Letter from Don Peterson, DOE, to Myers, 13th Naval Dist. This letter was written in response to Navy comments upon the proposed master program of the City of Everett. Many of the comments made by Navy were identical to those raised with regard to the

Poulsbo plan. This letter illustrates DOE response to Navy's local program comments.

a. Discussion of the "interface" of local and state programs. DOE asserted that such coordination was a state responsibility.

b. Coastal zone boundaries. The letter asserted that a definition of coastal zone limits is provided in the state program.

c. Positive statement of Navy use of the shoreline. DOE asserted that Everett had considered all federal agency interests in the coastal zone. It argued that references to specific federal agencies would be cumbersome and "meaningless in light of competing . . . agency perceptions of the national interest."

d. Preventing encroachments. DOE confirmed that the state program was designed to prevent any encroachments that would reduce navigability. DOE to convey this concern to the city.

e. State's classification of federal lands. "The state's position remains that the environment classification system is an expression of the policy, and as such, it is not intended to address the question of jurisdiction." Acknowledges that substantial development permits are not to be required of federal agencies.

f. State-City authority regarding consistency. DOE agreed that consistency is a state concern.

g. State-City authority regarding permissible uses of bedlands. DOE asserted that local governments have some authority over bedland areas in conjunction with the DOE and the State Department of Natural Resources.

16. March 10, 1976. File memo, Emily Ray, DOE. Ray's memo described results of a DOE-Navy meeting regarding the stubborn issues that remained as obstacles between the parties for agreement over a WCZMP. The Navy continued to urge that the WCZMP document incorporate the concerns it expressed over the local programs.

17. May 6, 1976. Letter from Murray Walsh, DOE, to Dumas, 13th Naval Dist. DOE claimed that federal agencies could be considered applicants for §307(c)(3) purposes and that the Secretary of Commerce intervention provision would act as an escape hatch in the event of serious conflict. The relationship of state and local programs was again discussed.

18. June 1, 1976. Washington Coastal Zone Management Program received final approval.

19. July 23, 1976. Letter from Ray, DOE, to Dumas, 13th Naval Dist. DOE responded to the Navy's concern that a local master program had classified Navy lands despite federal lands exclusion. The distinction between SMA "shorelines of statewide significance" and CZMA "areas of particular concern" was made clear. The Navy concern regarding relationship of the state and local programs was addressed.

20. September, 1976. The Navy submitted a certification that its construction of a magnetic silencing pier for the Trident project was consistent with the WCZMP. The certification states that it is offered "(i)n accordance with sec. 307 (c)(3)" of the CZMA.

21. September 27, 1976. Interoffice memo, DOE. This memo observed that the Navy certification on the magnetic silencing pier was the "first to come through the system." It described procedural problems that occurred

in the Corps permitting process relating to the consistency determination: the certification was not included with the §10 application at the time of initial A-95 review. As a result, DOE was not alerted to the consistency issue immediately, and DOE response to the notification was given without consistency review. Nevertheless, DOE subsequently informed Navy that it could not concur with the Navy's assessment that the project was consistent- in view of the decreased public access to the area resulting from the development. DOE indicated that because no practical alternatives were available, the project was consistent to the maximum extent practicable.

22. January 27, 1978. File memo, Emily Ray, DOE. Ray described a phone call from Navy Engineering Command in San Bruno, California requesting information about the purposes of classifying Navy land. Was the Navy expected to comply with these designations? The Navy indicated its concern with public expectations.

ATLANTIC RICHFIELD'S PROPOSED OIL PORT CONSTRUCTION AT CHERRY POINT

INTRODUCTION

On May 2, 1977, Atlantic Richfield Co. (ARCO) submitted an application to the District Office of the Corps of Engineers to build an "oil tanker pier addition and effluent diffuser" at Cherry Point, Washington. The expanded Cherry Point facility was planned as a transshipment point for Alaskan oil which would be routed through Canada to midwest refineries. The proposal to pipe oil east from Cherry Point had been controversial in Washington. Opposition came from those concerned about the hazards of increased oil tanker traffic through Puget Sound that the plan would require.

This proposal and others had been studied and debated during the development of the WCZMP. The Washington program contains a policy statement by former governor Dan Evans which "supports the concept of a single, major crude petroleum receiving and transfer facility at or west of Port Angeles." (p. 136.) Port Angeles is located west of Puget Sound on the Strait of Juan de Fuca. The statement indicates that proposals to expand existing offloading facilities like those of ARCO at Cherry Point, would be considered inconsistent with the program. The inclusion of the policy statement was in turn opposed by those who favored Cherry Point expansion. It was argued that the location of a transshipment point at Port Angeles would also necessitate environmentally risky maneuvers. Governor Dixy Lee Ray who was elected in November, 1976 adopted a position that the policy be

dropped. Thus, the State Department of Ecology had contacted NOAA in April, 1977 requesting procedures for its elimination.

Sec. 10 of the Rivers and Harbors Act of 1899 requires the issuance of a Corps permit before construction could begin under the proposed project. Corps § 10 permit activities are subject to the consistency provisions of the Coastal Zone Management Act, § 307 (c)(3). ARCO's May, 1977, application did not include certification that the project was consistent with the Washington Coastal Zone Management Program (WCZMP) as required by § 307 (c)(3).

In mid-July, an ARCO official sought to "supplement" the earlier application with a letter in which he certified that the project was consistent with the Washington program. However, the letter contained a proviso that the policy statement was not properly promulgated and was, therefore, a "nullity." It observed that this "defect" could "invalidate the entire program." On July 28, 1977, the Corps received an amended application which included a certification that the project would be consistent with "all legally valid provisions of the . . . program."

The Corps of Engineers proceeded with the processing of the application which involved collection of data for the preparation of an environmental impact statement. The State Dept. of Ecology did not respond to Corps notice that the application was pending although the proposal raised consistency problems in view of the Evans statement. DOE indicated that it would await the outcome of the deliberations of the Energy Facility Site Evaluation Council. A private environmental group, the Coalition Against Oil Pollution, challenged both DOE and the Corps in a subsequent law suit. The Coalition brought suit in state court against DOE arguing that the agency could not ignore the ARCO application which was so clearly

inconsistent with the WCZMP. The group sued the Corps in federal court asserting that the defendant could not process the ARCO application unless it contained a clear and unequivocal certification of consistency with the WCZMP.

The controversy later became moot when Washington Senator Warren Magnuson introduced a rider to the Marine Mammal Protection Act which in essence adopted the Evans policy statement regarding the siting of a single petroleum transfer facility at or west of Port Angeles.

CONSISTENCY ISSUES RAISED

A. Providing consistency certifications in applications for federal licenses and permits under §307(c)(3).

ARCO did not provide a certification of consistency at the time of its application for the Corps §10 permit. It did supply a supplement to the May 2, 1977, application certifying consistency. Later an entirely new application was submitted apparently in an effort to meet the exact requirement of §307(c)(3); i.e., the applicant "shall provide in the application to the licensing or permitting agency a certification" of consistency.

State Department of Ecology guidelines used at that time indicated that the state would review applications for consistency with the state CZ program and that the applicant's inclusion of a certification was not necessary. (*See* Operational Guidelines, Dept. of Ecology, as amended June 1, 1976.) The Dept. of Ecology reasoned that the applicant could not reasonably be required to certify consistency until all state and local permits had been acquired. It was thought more convenient for applicants to apply for necessary permits simultaneously rather than sequentially. The State Attorney General's office subsequently found the state's procedure to be contrary to statutory requirements. At this writing, new guidelines are in preparation.

B. State agency responsibilities to act affirmatively on pending applications.

The decision in the Coalition Against Oil Pollution v. State of Washington case (#830785 (Super. Ct. King County) July 22, 1978 (unpublished memorandum opinion)) is one of the few opinions construing the consistency provisions of §307(c)(3). In that case, the court determined that it was not permissible for DOE to fail to act when a pending

application was clearly inconsistent with the state program even though changes were anticipated in the program which would affect the consistency of the proposal.

> "The State of Washington, through its designated agency, the Department of Ecology, has a duty under the National Coastal Zone Management Act of 1972 and various state laws to notify the appropriate federal agency that it concurs or disagrees with a valid certification of consistency with the federally approved Washington State Coastal Zone Management Program when such a certification has been submitted to the State by an applicant for a federal permit or license pursuant to the requirements of the National Coastal Zone Management Act.
>
> 2. The duty described in paragraph 1 above arises at the earliest practicable time the State of Washington, through its designated agency the Department of Ecology, is capable of making the determination of concurrence or disagreement with the applicant's certification of consistency with the existing federally approved Washington State Coastal Zone Management Program."

The decision then concludes that the state agency cannot discretionarily waive any objection to a pending application by simply failing to respond which would result in a conclusive presumption of consistency when the six month period of §307(c)(3) elapsed. (*See* also 15 C.F.R. §930.62.)

DOE's decision to forestall a response on the Corps §10 application was based upon its decision to await the outcome of the deliberations of the State Energy Facility Site Evaluation Council on the project. That body is empowered under state law to deal exclusively with energy facility siting questions. Articulation of the relationship between EFSEC and DOE as regards consistency and site selection matters has been addressed by DOE in recent amendments to the Washington Coastal Zone Management Program.

C. Federal permitting agency's authority to process an application when a consistency certification is lacking or unclear.

The Coalition Against Oil Pollution argued that the Corps of Engineers had no authority to begin processing the ARCO application in the absence of an unequivocal consistency certification. It was argued that 307(c)(3) contemplates a sincere and accurate assessment of the consistency of a

proposal, and does not permit certification of partial consistency. The Coalition attacked ARCO's claim that it was consistent with all "legally valid" portions of the WCZMP, arguing that ARCO had no authority to disregard any part of the State"s approved program.

While acknowledging that it had no authority to issue a permit to ARCO if the project was deemed inconsistent by the state, the Corps insisted that it could nevertheless continue processing the ARCO application. It reasoned that the CZMA distinguished between permit issuance and permit processing. CZMA requirements were likened to other environmental "procedural requirements;" e.g., those of NEPA and FWPCA, observing that "it is always the case that the Corps has no authority to issue a permit at the time an application is received."

The Corps maintained that the Coalition's position was incompatible with the provisions of §307(c)(3) which provide "two independent routes" to satisfy the requirements of that section: consistency certification and secretarial review. Corps' analysis of issues involved distinguished the criteria to be used by the state agency from those used by the secretary under §307(c)(3). Corps also determined in the course of this controversy that it had no independent authority to determine consistency under §307(c)(3) (for example, in the absence of state response) in view of the conclusive presumption provision of that section. This of course is contrasted with federal permitting agency authority under §307(c)(1) and (2) in which cases the federal agency determines the consistency of its own actions with the state CZ program.

APPENDIX: CHRONOLOGY OF EVENTS AND CORRESPONDENCE

1. June 1, 1976. WCZMP given final approval by OCZM.

2. April 15, 1977. Letter from DOE to OCZM. DOE indicated its intention to delete the Evans policy statement from the WCZMP, regarding the siting of a single oil transfer facility at or west of Port Angeles.

3. May 2, 1977. ARCO applied for Corps §10 permit for construction of an oil tanker pier and effluent diffuser at Cherry Point which is east of Port Angeles in Puget Sound. Corps soon thereafter began processing the application.

4. May 17, 1977. Letter from OCZM to DOE. OCZM responded to DOE's April 15 request describing appropriate procedures for amendment to the WCZMP.

5. June 10, 1977. Letter from William Becker, attorney for the Coalition Against Oil Pollution, to DOE. Becker urged DOE to respond to the ARCO application by declaring such application inconsistent with the Evans policy statement regarding the siting of oil facilities in Washington. Becker observed that a failure to respond within six months would result in the conclusive presumption of the application's consistency. DOE later indicated its intent to await the decision of the State Energy Facilities Site Evaluation Council (EFSEC) on two proposals for facilities siting for Alaskan oil in the Washington coastal zone.

6. July 1, 1977. Coalition Against Oil Pollution v. Washington lawsuit filed in state court (#830735, Super. Ct. King County). In this suit, the plaintiff sought a writ of mandamus compelling DOE to respond to the ARCO §10 application. The Coalition alleged that the state's

approved program containing the policy statement would continue in effect until proper procedures for its amendment were completed. DOE had been notified by OCZM that changing the program might require an environmental impact statement and public hearing, which would take longer than the six-month period. Furthermore, DOE's failure to respond within a six-month period would result in the conclusive presumption of consistency under Sec. 307(c)(3). In an affidavit supporting the request for mandamus, the Coalition argued that EFSEC had no authority to determine the consistency of the ARCO application with the WCZMP.

7. July 18, 1977. Letter from Fielding Formway, ARCO, to Seattle District Office, Corps of Engineers. In this letter, ARCO certified that the Cherry Point construction was in compliance with the approved WCZMP with the exception of the Evans policy statement.

8. July 22, 1977. "Procedural" issues argued before Judge Soderland of the Superior Court by parties in the Coalition Against Oil Pollution v. Washington case. Decisions in the court's order resolving the issues are noted:

(i) Does the Dept. have a duty to respond to a "valid certification of consistency" under these circumstances? The court concluded that DOE must act.

(ii) When does the duty arise? It arises "at the earliest practicable time" the agency is capable of making the determination of consistency or inconsistency.

(iii) Can DOE delay its determination in anticipation of changes in the state program? Delay is not permissible.

The court recognized the importance of the timely response to the application; but it recommended that the Coalition amend its Pearson complaint (*see* para. 12, below) to include a request that DOE be compelled to notify the Corps that the ARCO application was inconsistent. Thus, all issues and actions would be consolidated before the federal court.

9. July 26, 1977. Letter from William Becker to Michael Redfield, Counsel, Corps of Engineers. The Corps' decision to process the ARCO application was criticized in this correspondence from the Coalition attorney. It was argued that the certification provided by ARCO was defective under the CZMA and, as a result, the Corps had no authority to process the application. It was also stressed that ARCO must include a consistency statement when its application is submitted and that the certification must state total compliance with the "approved State Program." It was argued that § 307(c)(3) should be read so as to remove all discretion from the agency to take into account other factors which would indicate that an application would become consistent. The argument was that certification of consistency is mandatory for an application's meeting threshold requirements for agency processing. Thus, the Corps could not look to surrounding circumstances such as the impending oil shortage and Ray's decision to eliminate the Evans policy.

10. July 28, 1977. ARCO submitted an amended §10 application to the Corps of Engineers for the Cherry Point construction project. The application contained a certification that the activity would comply

with all "legally valid provisions" of the WCZMP.[1] ARCO asserted that the Evans policy was not a valid provision of the program.

11. August, 1977. Redfield, Counsel, Corps of Engineers prepared a memorandum evaluating the issues raised by the Coalition.

The Corps took serious issue with the reading of the Coastal Zone Management Act urged by the Coalition. It was argued that there must be a distinction between processing an application and issuing a permit under § 307(c)(3). Redfield drew his conclusion through analogy to the environmental impact statement requirements of NEPA and water quality certification requirements, that § 307(c)(3) set out procedural standards that must be met before permit issuance. He backed this reading with the comment that time could be saved in application processing if various procedural requirements could be pursued concurrently.

It was acknowledged that the Corps had no power to issue a permit in the absence of a consistency certification, except it was claimed that an appeal to the Secretary of Commerce for a finding of consistency with the objectives of the CZMA or a finding that the project is necessary in the interest of national security is an independent route for meeting §307 (c)(3) requirements. If this is the case, it would mean that projects which are obviously inconsistent can be permitted even over state objection.

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[1]Issue of the validity of the Washington Program was raised in a suit by Clallam County. On August 5, 1977, the county (in which Port Angeles is located) filed an action in federal court (W.D. Wash.) seeking to have the state program declared invalid. Named defendants were the Secretary and other officials of the Dept. of Commerce, the governor of Washington, and the head of the Dept. of Ecology. The complaint alleged that the Evans policy statement was inserted in the program without benefit of public hearing and NEPA review in violation of federal and state law.

This analysis agreed with the Coalition that the Corps has absolutely no power to judge the consistency or inconsistency of a particular project. It noted that in the event of a state agency's failure to challenge activities that would appear to be inconsistent, the federal permitting agency must nevertheless presume the consistency of the unchallenged activity. It was noted that a dismissal of applications which do not contain consistency determinations would be beyond the Corps' statutory powers since this would "read out of the Act the role of the Secretary of Commerce and the right an applicant has to approach him."

It was also claimed that the Corps had a responsibility to go forward with processing the application. Reasons given for this judgment included:

-- the impending oil shortage in the Northern Tier states;

-- Congressional directives that all proposals to alleviate the oil shortage problem be expedited;

-- the fact that processing the application entailed gathering environmental data which would be helpful in resolving the issues; and

-- concern that the Evans policy statement which was subject to attack would not be upheld as a valid part of the Washington program.

12. August 11, 1977. Pearson v. Corps of Engineers suit filed (#C77589V (D.C.W.D. Wash.)). In this suit brought by individual members of the Coalition Against Oil Pollution and the Coalition, plaintiffs sought declaratory judgment that the ARCO application was "incomplete and inadequate." It also requested injunctive relief to prevent the Corps from processing the application or developing an environmental impact statement on the project. The complaint argued that until

it was ruled otherwise, the entire Washington program was "valid, legal and enforceable." It stated that the ARCO official had no authority to declare any portion of the program a "nullity" and that certification with reservation (*see* ARCO's July 28, 1977 application, para. 10) was not sufficient under the Act. It further claimed that Corps' action in processing the application was arbitrary, capricious and in abuse of discretion."

13. October 5, 1977. Senator Warren Magnuson introduced to a marine mammal protection bill a rider that in essence adopted the Evans policy statement regarding the siting of a single petroleum transfer facility at or west of Port Angeles. The bill was passed and signed within a few days, thus effectively mooting the Pearson case. The Corps has discontinued processing the ARCO application and considers the project now defunct.

14. December 15, 1977. Letter from Gov. Dixy Lee Ray to Richard Frank, OCZM. In this letter, the governor observed that the passage of the marine mammal amendment "effectively places the state in a position of advocating and promoting a particular site at or west of Port Angeles. This is contrary to the vast majority of opinion expressed in public testimony."

15. May, 1978. The Department of Ecology and OCZM continue to correspond on the matter of the procedures to be used in amending the program to eliminate the Evans policy. OCZM is in the process of developing an EIS on the proposed deletion. Action in two of the above-mentioned cases -- Pearson and Coalition Against Oil Pollution -- has halted in view of the Magnuson amendment. The Clallam County suit is still being prosecuted in federal court.

THE RAY V. ARCO CASE

INTRODUCTION

With the impending influx of Alaskan oil as a result of North Slope production, there has been much public concern in Washington due to the likelihood that the state would become a major transshipment point. Two proposals have been discussed that would involve the piping of Alaskan oil from Washington to Midwest refineries. One proposal, that of the Trans Mountain Oil Pipeline Corporation, proposed transshipment from ARCO facilities at Cherry Point, Washington. Such a scheme would involve delivery of the oil by tanker through northern Puget Sound. Increased tanker traffic through the narrow channels in the area was thought by many to be extremely hazardous.

Thus, on May 29, 1975, the state legislature passed the Tanker Law, Rev. Code Wash. §§88.16.170 et. seq., which contains the following provisions:

i. Oil tankers of 50,000 dead weight tons (dwts) or greater must take and pay a state licensed pilot on entering Puget Sound.

ii. Oil tankers between 40,000 and 125,000 dwts on entering Puget Sound must either meet certain design specifications (twin screws, double bottoms, etc.) or proceed with tug escort.

iii. Oil tankers exceeding 125,000 dwts are excluded altogether from Puget Sound.

On May 29, 1975, ARCO and an intervening plaintiff, Seatrain, a tanker construction firm, filed suit in U.S. District Court seeking to have the law declared invalid. It was argued that state-lawmaking authority to regulate

vessel traffic and construction specifications had been preempted by the Ports and Waterways Safety Act of 1972. (PWSA) (P.L. 92-340). The PWSA directs the Secretary of Transportation to adopt regulations regarding oil tanker design, construction, maintenance and repair. PWSA further empowers the Coast Guard to establish vessel control systems in hazardous areas. This Coast Guard authority embraces routing of vessels, setting vessel size, speed limits and operating conditions.

A summary of plaintiffs' arguments is as follows:

(1) The PWSA "expressly stated" the intent to preempt state legislation in the areas governed by the federal law.

(2) Preemption of state legislation in the field was implicit in the law since the scheme of regulation was so pervasive.

(3) The PWSA mandate to the Coast Guard to consider environmental matters in adopting regulations precluded state control for the same purpose.

(4) The Tanker Law's ban of some oil tanker traffic on Puget Sound was an unconstitutional attempt to exclude federally-licensed commerce, imposing a direct burden on interstate commerce.

(5) The Washington tanker ban was a "unilateral act . . . in an area requiring national uniformity."

(6) Prohibition of oil tankers in Puget Sound in excess of 125,000 dwts. was a "violation of the principle of 'innocent passage'."

The state's answer to these claims emphasized the uniqueness of Puget Sound as a resource, its exceptional beauty and the state's heavy economic

dependence upon its remaining unpolluted. It further stressed the extreme threat to the marine ecology posed by increased vessel traffic on the Sound, pointing out the fact that tankers must negotiate some narrow and intricate straits to proceed to the ARCO offloading terminal at Cherry Point. The state's brief articulated the following arguments to support its position:

(1) The PWSA did not explicitly preempt the Tanker Safety law and that preemption should not be easily presumed.

(2) Since there is no "direct and positive" conflict between federal and state laws, the state law may stand. The Coast Guard rules apply to vessel traffic which are otherwise "authorized" to enter state waters.

(3) Laws which are designed to protect the public health and safety should not be struck down in the absence of clear Congressional intent.

(4) Burdens imposed on interstate commerce were minimal.

(5) The approval of the Washington Coastal Zone Management Program (which included the Tanker Law) revealed a federal policy of supporting state efforts to regulate for the environment. The trend in tackling thorny problems of environmental pollution is the adoption of national legislation facilitating cooperative regulation by state and federal authorities (e.g., FWPCA). The CZMA was a "product" of this evolving federal policy of cooperative federalism in that states are encouraged to "exercise their full authority" over land and water. It was pointed out that the CZMA requires states to adequately consider the views of federal agencies which will be affected by the state program. It also

pointed out that final program approval results in federal agency responsibility to conduct its activities directly affecting the coastal zone in a manner consistent with the program to the maximum extent practical. The answer described the WCZMP and the Evans policy statement supporting a single offloading and transfer facility at or west of Port Angeles designed to minimize the oil tanker traffic on Puget Sound. It was alleged that the program now controls "who may do what on Puget Sound." It concluded that the Tanker law did not conflict with "federal policy, statutory or constitutional."

On September 24, 1976, a three-judge district court issued a decision declaring the Tanker Law invalid due to preemption by the PWSA. The "comprehensive(ness) of the federal scheme" persuaded the court of Congressional preemptive intent. The court remarked upon the arguments put forward by the state regarding the effect of the WCZMP. It concluded that there are no assurances that the Secretary of Commerce actually considered the views of the Coast Guard before approving the WCZMP. Furthermore, the Secretary may not have noted the preemptive effect of the PWSA.

The opinion stated that the "cooperative federalism" argument was not appropriate to the case since the PWSA does not invite state participation in the adoption of control regulations. Nor did the approval of the state program "waive" federal preemption.

Washington appealed the 3-judge decision arguing that the lower decision on the cooperative federalism argument was erroneous. The state urged that the PWSA's lack of explicit invitation to state participation in regulation

should not be given the prime focus of attention. This observation should not reverse "the established requirement that state police powers are preempted only where Congress clearly and manifestly intends such a result."

It once again stressed the incongruity that Congress should eliminate state authority in the very area in which it sought to encourage full state participation; i.e., in the area of land and water management. The State's brief on appeal to the Supreme Court did not fully articulate the CZMA argument presented to the lower court.

The Supreme Court handed down its decision in the ARCO case on March 6, 1978. The Court held that various provisions of the Washington law were in conflict with the PWSA and regulations adopted thereunder by the Coast Guard and were, therefore, pre-empted in view of the supremacy clause. The Tanker Law provisions were disposed of in the following way:

(i) Pilot provision (tankers of 50,000 dwts or greater must take and pay a state-licensed pilot on entering Puget Sound): Although the PWSA requires that "coastwise steam vessels" must employ pilots licensed by the Coast Guard and that states may not impose any other licensing requirements, states are still free to require tankers in excess of 50,000 dwts. to take on state-licensed pilots on entering the Sound. Statutory construction indicated that additional state requirements were permissible for vessels entering and leaving ports.

(ii) Tanker vessel safety features: The Court concluded that the PWSA indicated that Congress intended uniform national standards to be applied regarding construction and safety features of tankers. Thus, additional

or more stringent standards could not be imposed by the state.

(iii) Tug requirements (the Washington law required vessels not meeting the design requirements to proceed with tug escort): This alternative requirement was allowed to stand by the court. Court stated that the Secretary of Transportation clearly has the authority to require tug escorts but where he had not done so and had not decided that such requirement should not be imposed, the state's requirement could stand.

(iv) Exclusion of vessels over 125,000 dwts.: Court decided that the Secretary had considered prohibition of vessels over a certain size in Puget Sound and had declined to make any prohibitions. For this reason, the state could not exclude the larger tankers. Dicta indicates that a federal official's failure to affirmatively exercise his full authority can "take on the character of a ruling that no such regulation is appropriate."

Shortly after the decision, Transportation Secretary Brock Adams established a temporary order continuing the ban on tankers in excess of 125,000 dwts. from entering the Sound. The Coast Guard, also, has begun consideration of regulations under the PWSA which would address the topics contained in the Tanker Law.

CONSISTENCY ISSUES RAISED

A. Inclusion of the Tanker Law within the Washington Coastal Zone Management Program.

In its brief for the three-judge court, the state argued that the Tanker Law was part of the WCZMP:

> "As of June 1, 1976, [date of WCZMP approval], the United States had approved a zoning type program for the waters of Puget Sound . . . which includes [the Tanker Law] and the policies upon which it is based."

The lower court did not decide whether or not the Tanker Law was part of the program. It commented that Secretarial approval did not necessarily take into account the possibility that the Tanker Law was preempted by federal law.

On appeal, ARCO denied that the law was a part of the WCZMP and it provided evidence from the "NOAA Administrator who approved the state program that he had no intention of approving the Tanker Law as part of the program." Thus, implicitly it was argued that OCZM's assessment of the content of the state program should prevail. The Court did not have occasion to address the issue since the state had not developed the specific consistency arguments. (*See* discussion below, Section B.)

Current OCZM regulations regarding a "recommended format for program submission" indicate that a state should include a "discussion" of and state legislation which is a legal basis for the implementation and enforcement of the state program. 43 Fed. Reg. 8422 (to be codified at 15 CFR §923.71 (iv)). Arguably, the WCZMP's brief discussion of the Tanker Law would not serve to notify OCZM that the Law was an integral part of the

WCZMP. The program refers to the Tanker Law in the context of means taken to protect state "areas of particular concern."

> "In recognition of the potential impact of Alaska North Slope Oil on Puget Sound and the Strait of Juan de Fuca, the Washington State Legislature has taken several steps to prepare for spill threats to the state's inland marine waters . . . Further, the 1975 Legislature passed House Substitute Bill 527, which provides for safety standards and prohibits tankers larger than 125,000 dead weight tons from entering Puget Sound and the Strait of Juan de Fuca beyond a point of east of the Dungeness Lighthouse." (*See* Washington Coastal Zone Management Program, pp. 17-18.)

B. State's litigation strategy of alleging "cooperative federalism" rather than specific interpretation of consistency provisions.

On appeal to the Supreme Court, the State chose to argue the broad policy implications of passage of the CZMA rather than to specifically analyze the consistency provisions and apply them in the case. It is likely that this tactic was chosen due to uncertainty on the issue of the Tanker Law status as a part of the program. Implicit in the "cooperative federalism" argument is an assumption of a broader scope for state legislative jurisdiction in all areas affecting land and water uses in the coastal zone.

The state argued that it would not be contrary to federal policy to involve the state in regulating vessel traffic and construction under the PWSA. Rather, the CZMA and other federal law indicate an affirmative Congressional intent to encourage state participation.

C. Implications of the state's arguments for Coast Guard activities under PWSA.

Presumably the state could urge the Coast Guard to exercise its statutory authority under PWSA by adopting regulations similar to those held invalid in the state law. Since Coast Guard regulatory activities are arguably "federal activities" within the meaning of §307(c)(1), it

might be argued that a Coast Guard failure to adopt protective regulation would be inconsistent with the state program and, therefore, a violation of the CZMA.

On the other hand, the Supreme Court stressed the fact that the PWSA does not contemplate state participation in the federal decision-making process:

> "While [CZMA and FWPCA] contemplate cooperative state-federal efforts, they expressly state that intent, in contrast to the PWSA." Ray v. Atlantic Richfield, 98 S. Ct. 988 (March, 1978) (ftnt. 28).

However, one perspective of the Court was undoubtedly influenced by the fact that the major issue in the case was the pre-emptive effect of the PWSA and Coast Guard regulations issued thereunder. Whether or not state activity is pre-empted by a federal statute need not exempt the federal agency from a duty to confer with the state regarding the effect of a federal decision upon the state program. Thus, cooperative federalism is not incompatible with pre-emptive authority in a federal agency. However, the final consistency decision is unquestionably with the federal agency.

D. Ray v. ARCO holding: Effect on scope of issues covered under a coastal zone management program.

The Supreme Court indicated unwillingness to view the CZMA as having extended state powers into specific regulatory areas from which they may have been pre-empted. It would seem clearly possible that regulation of land and water uses like those the Tanker Law attempted to control can be shown to be reasonably within the subject area of coastal zone management. The Court however was persuaded that federal legislation dealing with the specific issues the Tanker Law sought to address could limit the

broader subject area which comprehensive coastal zone planning seeks to control. It would seem then that federal legislation dealing with specific subject areas may pre-empt subject areas that could logically be included in a coastal zone program.

The state through the approval of its coastal zone management program does not acquire additional authority in subject areas prohibited to it due to pre-emption by federal law. Of course, since pre-emption determinations are made judicially, a state cannot be sure that legislation included in its program has not been pre-empted. However, nothing would seem to prohibit the state's expression within its program of a policy that could be carried out, as in this case, through some federal action. Ideally, program policies are adopted after full consultation with effected federal agencies. In conclusion, the existence of the consistency provisions may represent additional leverage for the state in achieving coastal management goals.

CITY OF OCEAN SHORES AIRPORT CONSTRUCTION PROJECT

INTRODUCTION

The city of Ocean Shores, population 1,000, is situated at the tip of the northern peninsula which partially encloses Grays Harbor on the Washington coast. The city is included within the area of the Grays Harbor Estuary Management Program. Some issues in the application and administration of §307(d) of the CZMA arose in the context of Ocean Shores' application for airport planning and construction grants from the Federal Aviation Administration.

CONSISTENCY ISSUES RAISED

A. Procedural requirements for federal granting agency's compliance with §307(d) responsibilities.

DOE and the Federal Aviation Administration disagreed on procedures to be used to satisfy the consistency requirements of §307(d). DOE claimed that its operational guidelines should apply, which would require FAA to be sure that DOE's certification of consistency or statement that consistency did not apply was attached to each grant application. FAA depended upon its own regulations instructing regional offices about CZMA requirement. Those regulations claimed that the state agency administering the CZMA program must initiate its review of proposals through the A-95 process and must adhere to the 60-day time limits of the A-95 process or lose an opportunity to object.

Recently adopted OCZM regulations indicate that federal agencies may grant the requested federal assistance if the lead state coastal zone management agency fails to object to the application for assistance. 43 Fed. Reg. 10530 (to be codified at 15 C.F.R. §930.96). "Objection" includes determination of inconsistencies with specific program details. Thus, in OCZM's view, §307(d) requires the state agency to initiate consistency review pursuant to established A-95 procedures.

B. Conclusiveness of the state's consistency review for §307(d) purposes.

FAA objected to the tentative nature of DOE's comments regarding consistency in the November 4, 1976 letter. (See para. 7-8 below.) In that letter, DOE commented on airport site alternatives and indicated

that it would address the consistency issues at a later time. The state's letter appears to satisfy the requirement of §307(d) which merely requires the applicant to "indicate the views of the appropriate state or local agency." However, FAA was hesitant to grant funds until it was assured that the project had an unequivocal consistency determination by DOE. States may find that federal agency pressures for unequivocal consistency statements, and OCZM's view that the state must make an affirmative finding, are too restricting. As demonstrated by the Ocean Shores case, more time for analysis and negotiation may be needed before the state can make the consistency determination.

C. Appropriate state or local agency for §307(d) purposes.

There was little discussion between the parties as to which state entity -- DOE or the City of Ocean Shores -- was the "appropriate" commenting agency in this matter. FAA wished to have assurances from DOE, but DOE attempted to use the ordinary channels for shoreline decision-making, i.e., the substantial development permitting process at the local level. This is further complicated by the existence of the Grays Harbor Estuary Task Force (GHETF) which is now meeting to develop amendments for the local shoreline master programs. These amendments will be based upon a comprehensive estuary management plan.

D. Proper timing of state consistency review to insure sufficient specificity of project proposal.

The airport planning process in this case has involved FAA in numerous tasks and decisions which have extended over a four-year period. The initial planning grant included support to conduct necessary environmental

studies. The agency prepared and circulated an EIS which was then reviewed to meet objections that had surfaced. Final EIS approval will be given when coastal zone management issues are settled. Construction funds will then be awarded.

The proposal was not sufficiently specific at all stages of this process to permit a definitive resolution of the consistency issues raised. For example, final decision upon a site for the airport still had not been made in October, 1977 -- more than 60 days after circulation of the draft EIS on the project. Examination of alternatives continued well beyond the A-95 review period.

A proposal of this sort must have a certain degree of definiteness before DOE may realistically expect to resolve coastal zone management issues. DOE was reluctant to commit itself to a position on the consistency question until construction details were finalized. FAA recognized the state's position and, in effect, gave its approval pending final resolution between Ocean Shores and the Grays Harbor Estuary Management Council on mitigation features. It concluded that its consistency responsibilities under §307(d) would be met if the airport proposal was accepted as part of the Grays Harbor estuary management plan. Because the GHEMP is based on a negotiation process between agencies, what is or is not consistent changes on a day-to-day basis.

APPENDIX: CHRONOLOGY OF CORRESPONDENCE AND EVENTS

1. Early 1974. Ocean Shores applied for an FAA planning grant to finance the design and environmental studies for the construction of a new airport. The grant was awarded, and planning activities followed. Also at this time, Ocean Shores was working on its shoreline master program, and one of the later selected sites was "zoned" for the airport in that plan.

2. August, 1976. Ocean Shores submitted a project proposal to the FAA which included a consultant's environmental report and a discussion of three alternative sites for the airport, one of which was designated the preferred site.

3. June 1, 1976. WCZMP received final approval.

4. June 20, 1976. FAA drafted an environmental impact statement on the project which was mistakenly circulated to the State Office of Community Development for circulation pursuant to the A-95 review process. The proper A-95 clearinghouse for the project was the Office of Program Planning and Financial Management. Due to this improper routing, DOE did not receive the draft environmental impact statement. Thus, it was not alerted to the pending proposal and issued no comments on the proposal. FAA personnel were of the opinion that a state agency's failure to comment on the project within the 60-day A-95 review period could be interpreted as concurrence with the proposal. The FAA had so informed the Office of Community Development when the draft EIS was sent.

5. September 20, 1976. A-95 60-day period expired.

6. October, 1976. Because it had received no comment from state agencies on the proposed airport project, FAA contacted the DOE to determine if review had taken place. The routing error described above (*see* para. 4) was discovered at this time. DOE replied that it did wish to review for consistency maintaining that its failure to respond within the 60-day period could not be interpreted as concurrence with the project, at least insofar as the coastal zone impacts were concerned. DOE argued that its guidelines required the federal granting agency to affirmatively ascertain that the proper consistency determination had been made before grants. (*See* Operational Guidelines for Federal Consistency, State Department of Ecology, as amended, June 1, 1976.) DOE officially requested additional time in which to review for consistency; FAA agreed.

7. November 4, 1976. DOE director wrote FAA specifying objections to the preferred site and indicating that "[w]hen Ocean Shores submits its application for funding, the State will comment on the consistency of the application with the Washington State Coastal Zone Management Program."

8. November 11, 1976. FAA expressed its dissatisfaction with the indefiniteness of DOE's consistency determination and the postponement of the decision. DOE explained that the initial consistency review takes place at the local level under the Shoreline Management Act and that it could not "precommit" the local permitting authority under the state's CZM scheme. DOE suggested that the substantial development application process be initiated.

9. April 8. 1977. DOE informed FAA that if Ocean Shores would revise its plan to meet the objections listed in the November 4 letter (*see* para. 7), the project would be consistent with the WCZMP. The letter also indicated that the Department would not press the "procedural" issue as to whether it could withhold a consistency determination until an initial consistency determination was made at the local level.

10. October, 1977. FAA officials, Department of Ecology officials and city representatives met and reviewed the project. Visits were made to the preferred and alternative sites. A memorandum prepared at DOE indicated that the parties were weighing possibilities for the mitigation of coastal zone impacts.

11. May, 1978. The proposed final EIS was not yet approved due to conflicts between federal and state resource agencies over the fill required for the airport site. Ocean Shores is engaged in negotiations with the Grays Harbor Estuary Task Force to minimize the impacts of airport construction. One method of mitigation being debated is to reduce fill in other parts of the estuary to compensate for filled areas for the airport project. The regional office of FAA reported that the parties were nearing a resolution at that time. The EIS will then be modified to reflect the agreement reached by the parties.

NPDES DELEGATION TO EFSEC

INTRODUCTION

The correspondence described in the appendix below involved the application of the consistency provisions to an administrative activity of a Federal agency. The agency, EPA, was requested to transfer NPDES authority to the Washington Energy Facility Site Evaluation Council (EFSEC). EFSEC is empowered to undertake comprehensive consideration of proposals to site energy facilities in the state. A predecessor to EFSEC, the Thermal Power Plant Site Evaluation Council, had possessed NPDES permitting authority for the facilities it reviewed and certified. EFSEC sought to receive permitting authority for the additional installations it was empowered to review when it took over the functions of its predecessor. EFSEC's approval of applications has a preemptive effect upon local land use and regulatory laws, including the Shoreline Management Act, which may prohibit facility siting in a particular location. Consolidation of NPDES authority for applications to EFSEC would further the comprehensive decision-making role of EFSEC.

The requested delegation change was being considered around the same time that Governor Ray was corresponding with OCZM about WCZMP amendments. Ray's primary aim was to delete from the program the policy statement of former Governor Dan Evans banning further construction or expansion of oil transfer facilities in Puget Sound. After Ray's initial request for information, Congress passed an amendment to the Marine Mammal Protection Act banning such construction or expansion on Puget Sound.

CONSISTENCY ISSUES RAISED

A. Federal administrative decision-making functions as federal activities requiring consistency review.

The exchange of correspondence on the question of the consistency of NPDES delegation to EFSEC expands the application of the consistency provisions beyond situations in which they have been typically applied since Washington program approval. Typically, federal activities requiring consistency review have involved projects affecting land and water use activities. From this correspondence, it appears that federal activities may also include the administrative decision-making processes not directly tied to a construction project under consideration. However, the recently adopted regulations may not contemplate consistency application to administrative activities: Only those federal activities having a "significant effect" upon the coastal zone are subject to consistency requirements (15 C.F.R. § 930.21). Only if an action causes significant changes in resource use, limitation in the range of uses of coastal zone resources or changes in the quality of coastal zone resources, will the federal action be deemed significant. The directness of the connection between the administrative decision and a significant effect may be more difficult to prove in the administrative activity situation.

B. Detection of consistency issues

The Federal agency, and not the State, took the initiative in clarifying consistency application to its activities here. Regional counsel raising the issue had a background familiarity with the CZMA. A less informed agency counsel may not have noted the issue at all. This suggests

that the real force of the consistency provisions may not be felt until state and federal agency personnel become more familiar with consistency requirements. It also suggests that the scope of consistency requirements may broaden as experience in various situations accumulates.

C. Program clarification through the program amendment process.

The state's efforts to amend its CZ program to delete the Evans single oil terminus policy stimulated OCZM to seek a clarification of the relationship between EFSEC and the WCZMP. The EPA and OCZM's role then was to encourage a coordination of activity among state agencies whose activities may affect the coastal zone. This recognition of responsibility on the part of OCZM to insure that a state fully articulate arrangements among the network of state agencies could be a substantial benefit to the full implementation of the state program.

D. Federal agency's ongoing responsibility to insure consistency with the state program.

The OCZM General Counsel concluded that EPA had an affirmative duty under §307(c)(1) to insure the CZMP was amply considered before NPDES delegation was transferred to EFSEC. Once it had received these assurances and delegation had been made, EPA would not be required to continually monitor EFSEC activities for their adherence to the program unless otherwise responsible for continued oversight:

> "NOAA considers that once the delegation of permit authority is granted to a state agency, which is bound by the state's coastal zone management program, that state agency assumes the responsibility to review permit applications for consistency with the State's own management program. However, to the extent that EPA retains any discretion to reassess the existing NPDES delegation to EFSEC, your reassessment would have to include consideration of the approved WCZMP."
> (citing "Proposed section 307 regulations, 15 C.F.R. §930.38")

APPENDIX: CHRONOLOGY OF CORRESPONDENCE AND EVENTS

1. July 20, 1977. Letter from Dixy Lee Ray to Juanita Kreps. Ray requested information from OCZM regarding the procedure for amendment of the WCZMP.

2. September 6, 1977. Letter from EFSEC to EPA. Washington's Energy Facility Site Evaluation Council (EFSEC) contacted EPA, Region X, with a request that the NPDES permitting authority in Washington be modified. DOE had been delegated that authority in the state. EFSEC requested that it be given such permitting authority with regard to application for the siting of energy facilities in the coastal zone.

3. October, 1977. Congress passed amendment to Marine Mammal Protection Act, including a provision banning construction of energy facilities in Puget Sound. This action thwarted Ray's major reason for seeking WCZMP amendment.

4. October 19, 1977. Letter from EPA, Region X to Larry Bradley, EFSEC Chairman. This letter made a number of suggestions and requests in response to EFSEC's request. It expressed concern that the EFSEC program submitted "did not address the relationship between EFSEC and the Washington Coastal Zone Management Program."

5. November 4, 1977. Letter from EPA, Region X to Brewer, OCZM. This letter expressed EPA's concern to OCZM. It asked for guidance concerning the applicability of the consistency provisions to the proposed delegation. "Our concerns stem from the fact that because EFSEC has the statutory authority it issue a 'preemptive state permit," it may not be

bound by local land use plans including shoreline master programs which are a part of the WCZMP." Specifically, EPA asked whether it was necessary for the agency to determine whether a proposed grant of authority (not the issuance of a permit per se) to a state agency is consistent with an approved state CZMP and whether EPA would be required by law to insure that such a permit program once granted to a state, is carried out consistently with the state's program.

6. November 17, 1977: Letter from Brewer, OCZM to Dubey, EPA, Region X. In this letter OCZM confirmed that the proposed delegation would be considered a federal activity which in part "would appear to directly affect the Washington coastal zone" and therefore must meet §307(c)(1) consistency requirements. In answer to the second question, OCZM advised that once permitting authority was transferred to a state agency bound by the CZMP "that state agency assumes the responsibility to review permit applications for consistency with the State's own management program."

7. November, 1977. Letter from Richard Frank, NOAA Administrator to Dixy Lee Ray. In this letter Frank inquired whether or not Ray still intended to amend the Washington program in view of the recently passed amendments to the Marine Mammal Protection Act. Although the deletion of the Evans policy statement and NPDES delegation to EFSEC are distinct issues, these program amendments were under consideration at the same time. The letter stated:

> "In deciding whether to approve this amendment request, we will consider whether the management program, as amended, will continue to meet the basic program approval requirements. Accordingly, a statement on the relationship of the Energy Facilities Site Evaluation Council (EFSEC) to the Department of Ecology and the coastal management program, including incorporation of EFSEC's procedures into the management program, is necessary. Please forward a statement on this point to us as soon as possible."

8. December 30, 1977. Letter from Wilbur Hallauer, DOE, to Frank. Hallauer provided to Frank a document entitled "Energy Facility Siting in the Washington Coastal Zone." This 8-page memorandum described EFSEC, the Shoreline Management Act and the State Environmental Policy Act. It then discussed ways in which EFSEC's statutory responsibilities provided a "coordinated mechanism for the anticipation and management of the impacts of energy facilities in or significantly affecting the coastal zone."

9. Current. The state is currently in the process of preparing program amendments for OCZM approval. Information in the "Energy Facility Siting in the Washington Coastal Zone" memo is being incorporated into those amendments.